85-344

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

IN RE: BERNARD DUTKA,

Petitioner,

vs.

DEPARTMENT OF THE TREASURY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

1. Did the Court of Appeals err in denying petitioner's motion to vacate the dismissal previously entered and to restore the case to the active trial list based on a technical procedural failure thereby denying petitioner his day in court?

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*The parties to the proceeding in the United States Court of Appeals for the Federal Circuit were petitioner Bernard Dutka and the Department of the Treasury, respondent.

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No.

In The

Supreme Court of the United States

October Term, 1985

IN RE: BERNARD DUTKA,

Petitioner

OPINION BELOW

The initial decision of the United States Merit Systems Protection Board dated July 25, 1985 is attached hereto; there is no judgment order (App. A). There is no written opinion of the United States Court of Appeals for the Federal Circuit; though there is a judgment dismissing petitioner's cause for failure to prosecute in accordance with the rules dated May 6, 1985 (App. B). There is no written opinion of the United States Court of Appeals for the Federal Circuit with respect to petitioner's notice of motion for an order vacating dismissal and to restore the case to the active trial list filed with the court by letter of May 17, 1985 (App. C). However, there is a letter from the Clerk of the United States Court of Appeals for the Federal Circuit stating that petitioner's motion for an order to vacate the dismissal of appeal and restore the case to the calendar was denied (App. D).

There is no written opinion of the United States Court of Appeals for the Federal Circuit with respect to petitioner's motion filed with the court on July 24, 1985 for an order denying the

motion to vacate the dismissal and to restore the case to the active trial list; there is a letter from the Clerk of the Court denying such request dated July 25, 1985 (App. E).

JURISDICTIONAL GROUNDS IN THIS COURT

The decision of the United States Court of Appeals for the Federal Circuit here sought to be reviewed is dated July 3, 1985 (App. D). That letter decision denied petitioner's motion for an order to vacate the dismissal of the appeal and to restore the case to the calendar thereby denying petitioner his day in court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the United States Constitution and Federal Rules of Appellate Procedure involved are set forth in Appendix F.

STATEMENT OF THE CASE

Petitioner, Bernard Dutka, a tax examining assistant, GS-7, for the Internal Revenue Service with the agency's Newark district office was subject to an oral investigation conducted by the Internal Revenue Service on or about November 4, 1983 after 12 years of service for alleged violations of the agency's Handbook of Employee Relations and Conduct. Specifically, the petitioner was terminated for the alleged failure to conduct himself in a manner which enhances public respect for and confidence in an agency employee, intentionally making a false statement in a matter of official interest and conduct which needlessly caused dissension and discord among employees. Petitioner then filed a timely

petition for appeal challenging the agency decision and the United States Merit Systems Protection Board following a one day evidentiary hearing affirmed the agency's findings and the petitioner's termination. A timely notice of appeal was then filed challenging the United States Merit Systems Protection Board's affirmation of the agency's termination.

Petitioner appealed the decision to the United States Court of Appeals for the Federal Circuit alleging that the termination was an inappropriate penalty for violation of agency rules and that the failure of the agency to provide exculpatory evidence at the hearing denied him due process of law requiring reversal. The jurisdictional basis for the appeal was predicated upon 5 U.S.C. § 7703(b)(1).

On September 6, 1984, petitioner's counsel, a solo practitioner, received acknowledgment from the United States Court of Appeals for the Federal Circuit of the filed petition for review (App. G). On October 29, 1984, petitioner's counsel received from the court the appeal number and docketing instructions (App. H). On November 8, 1984, petitioner's counsel sent to the court an entry of appearance together with 12 copies of a certificate of interest as required by court rule (App. I). On November 26, 1984, following a telephone conversation with the court, petitioner's counsel sent a corrected certificate of interest in compliance with Rule 8 (App. J).

On January 2, 1985, petitioner's counsel sent an application for admission to the court (App. K); due to some technical admission difficulties in finding the proper sponsor, petitioner's counsel was not admitted to the court until February 12, 1985 (App. L).

Due to difficulties in being admitted to the United States Court of Appeals for the Federal Circuit, petitioner was forced

to seek an extension of time within which to file the brief and appendix, which extension was granted and said brief was then due on or before February 28, 1985 pursuant to letter from the court dated February 26, 1985 (App. M). Due to some confusion the extension was actually granted until March 18, 1985 pursuant to letter from the court dated March 4, 1985 (App. N).

On March 18, 1985, petitioner's counsel had made arrangements to have the brief delivered to the court; there was a problem in that the cover page of the appeal brief was the wrong color (App. O).

As of May 6, 1985, the court dismissed petitioner's cause for failure to prosecute in accordance with the rules (App. B). On May 17, 1985, petitioner's counsel filed a notice of motion for an order vacating dismissal and to restore the case to the active trial list (App. C). By letter of July 3, 1985, petitioner's counsel was informed that the aforesaid motion was denied (App. D).

On July 15, 1985, petitioner's counsel filed a notice of motion for an order denying the motion to vacate the dismissal and to restore the case to the active trial list. By letter of July 25, 1985, petitioner's counsel was advised that the request for reconsideration of the previous denial per the court's letter on July 3, 1985 (App. D) was denied and in fact, was not considered by the court (App. E). Immediately upon receipt of the July 25, 1985 letter as aforesaid, petitioner's counsel telephoned the Clerk of the United States Court of Appeals for the Federal Circuit and was advised that the court did not in fact entertain the motion for reconsideration but merely dismissed it on a pro forma basis.

REASONS FOR GRANTING THE WRIT

Petitioner contends that review of the attached notices of motion and correspondence between counsel and the court clearly

reveal that the procedural rules involved in filing an appeal with the United States Court of Appeals for the Federal Circuit are complex and difficult if not overly burdensome. Counsel made every good faith effort to file the appeal timely, become admitted to the court and to then insure that the brief and appendix were timely filed in the appropriate manner. The complexity and harshness of the procedural rules have now limited and effectively abrogated petitioner's rights and remedies under the law to appeal from the Merit Systems Protection Board's affirmation of the Internal Revenue Service's termination.

Petitioner cannot state emphatically enough that every good faith effort was made to comply with the rules in a timely fashion.

On this basis, petitioner is in effect being penalized by the dismissal of the appeal and the court's refusal to hear counsel's motion for reconsideration for failure to comply with technical and merely aesthetic-like rules. Petitioner has been deprived of his day in court and thus of his rights of due process of law guaranteed by and emanating from the Fifth Amendment to the United States Constitution.

It is clearly within the sound discretion of the court to grant a writ of certiorari and allow petitioner his day in court on the basis of justice and fair play, albeit certain technical requirements of a lower court have inadvertently been violated most especially as petitioner has expended a great deal of time, effort and money in the perfection of the appeal and has been in compliance with these same rules early on. *Hyde v. Shine*, 199 U.S. 62 (1937).

CONCLUSION

On the basis of the foregoing, it is respectfully requested that the court enter an order vacating the prior order of the United States Court of Appeals for the Federal Circuit denying petitioner's motion for an order denying the motion to vacate the dismissal and to restore the case to the active trial list.

Respectfully yours,

JEFFREY S. FELDMAN
Attorney for Petitioner

APPENDIX A — DECISION OF UNITED STATES MERIT SYSTEMS PROTECTION BOARD

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

NEW YORK REGIONAL OFFICE

CASE NO. NY07528410320
July 25, 1984

Bernard Dutka

v.

Department of the Treasury, Internal Revenue Service

Appellant filed a timely petition for appeal challenging an agency decision to remove him from the position of Tax Examining Assistant, GS-7 with the agency's Newark District Office. The removal was based on the following three violations of the agency's Handbook of Employee Responsibilities and Conduct (HERC): (1) failure to conduct yourself in a manner which enhances public respect for and confidence in an agency employee; (2) intentionally making false statements in a matter of official interest; and (3) conduct which needlessly caused dissention or discord among employees. Each charge had several specifications. In taking the action, the agency also considered the fact that appellant has been reprimanded for harassing a supervisor.

When removed, appellant held a position in the competitive service and was not serving a probationary or trial period. He is therefore entitled to appeal his removal. 5 U.S.C. 7511(a)(1)(A); 7512(a);

7513(d); 7701(a)(1982). A hearing was convened at the agency's request.[1]

The following is an analysis of the evidence of record in light of the rule that to sustain a removal under U.S.C. chapter 75, subchapter II, the agency must prove by preponderant evidence that appellant committed the offenses alleged. 5 U.S.C. 7701(c)(1)(b) (1982). That evidentiary burden extends to every element of the offenses. *In re Van Sciver,* 1 MSPB 94 (1979).

Charge 1 — Failure to Conduct Yourself in A Manner Which Enhances Public Respect For And Confidence In An Agency Employee

The gravamen of this charge is that appellant violated section 228.2 of Internal Revenue Manual (IRM) 0735.1, HERC (April 27, 1979), which states in part:

> "Employees are expected to conduct themselves in their official relations with the public in a manner which will enhance public respect for and confidence in the employee as a public servant and the Service as a whole. Employees must be courteous, businesslike, diplomatic and tactful. They must not only perform their duties in a wholly impartial manner, but avoid any appearance of acting otherwise. Any lack of these qualities may be basis for disciplinary or other corrective action."

1. By failing to request a hearing in his petition for appeal or in response to a specific notice informing him of the deadline for making a belated request for a hearing, appellant waived his right under 5 U.S.C. 7701(a)(1). *Christian*

(Cont'd)

Appendix A

Agency file at Tab 3.

To support the charge, the agency elicited testimony from John F. Alyward, a taxpayer who sold "law enforcement supplies" and was formerly a criminal investigator with a local prosecutor's office. In his testimony, Mr. Alyward asserted that he first met appellant in February, 1981 while they were both patients in a local hospital. He recalled that appellant had sustained serious injuries in an automobile accident. After their discharge, appellant attempted to contact Mr. Alyward by telephone and mail on several occasions. Mr. Alyward testified that he did not respond because he was preoccupied with recovering from his own injuries. Sometime after returning to work, Mr. Alyward visited appellant at the latter's home. Mr. Alyward indicated that he had been making installment payments on a tax deliquency of about $1,400. According to him, appellant stated that the agency required a lump-sum payment because the taxpayer had sufficient funds in the bank. Appellant then offered to show him how to complete certain forms and thereby obtain an installment payment plan from the agency.

Mr. Alyward further testified that they met again in February, 1983 to discuss the former's tax problem, even though appellant had not been assigned to the taxpayer's account. During the meeting, appellant stated that he was a "big man" and for about $400 and an unlisted telephone number, he could clear the taxpayer's account. Mr. Alyward reported the matter to the Federal

(Cont'd)

v. U.S. Postal Service, 3 MSPB 395 (1980). The agency, however, requested and was granted a hearing to present testimony necessary for the resolution of credibility issues. *See* 5 C.F.R. 1201.25(b) (1984); *Thompson v. Department of Transportation*, 9 MSPB 194 (1982).

Appendix A

Bureau of Investigation (FBI) because appellant appeared to be soliciting a bribe. The FBI referred him to the Internal Revenue Service's inspection service. After meeting with agency inspectors, he agreed to allow them to monitor and record his subsequent telephone conversations and meetings with appellant.

Mr. Alyward also testified that during a monitored telephone conversation on or about March 7, 1983, appellant told him for "four bills" appellant's friend who operates an agency computer would eliminate the taxpayer's deliquency from the computer. Appellant also gave the taxpayer the address of Bernadette Basini, an agency employee, and requested that the taxpayer obtain her unlisted telephone number. A few days later, the taxpayer met appellant at a local restaurant. During their monitored meeting, the taxpayer, who had received $300 from agency inspectors, offered the money to appellant. According to the taxpayer, appellant declined to accept the money because his friend was still "researching" the matter and further stated that the price was now $500. He also told the taxpayer that he would leave a coded message on the taxpayer's answering machine indicating whether appellant's friend could clear the account. He advised the taxpayer to refer to the matter as a "loan" if the latter was ever questioned about it. The taxpayer asked whether appellant's friend was reliable and stated that he would be better off setting up a payment schedule with the agency. Appellant said his friend is "as reliable as I am" and that removal is the worst that could happen to appellant. Before the meeting ended appellant indicated that he wished to obtain a firearm with a silencer to practice in his basement, adding that he wished to "blow off some people's knee caps." The taxpayer then informed him that possession of a firearm with a silencer is illegal.

Appendix A

On March 21, 1983, appellant purchased, with his own money, a $500 money order from First National State Bank, Newark, New Jersey. He made the money order payable to the agency and wrote the taxpayer's name, address, social security number, and tax period on the money order. He then gave the money order to the payment posting section in the agency's Newark Collection Division. Agency file at Tab 4 and 5.

Mr. Alyward testified that he had another monitored meeting with appellant near a bank during the first week of May, 1983. According to him, appellant stated that his friend would "TC 670" the account and further indicated that the agency computer would show that the taxpayer's account was "clear." He asserted that revenue officers are "notorious crooks anyway" and when they die they will have to be screwed into the ground. Later in the meeting, appellant gave Mr. Alyward about $40 and requested the taxpayer to send a bouquet of flowers with a card signed, "Bon Voyage, Jim" to Carol Bello, an agency supervisor, at her home address. When asked whether Ms. Bello was his girlfriend, appellant responded in the affirmative and added that sending the flowers "will give me a chuckle; that will really tickle me." Mr. Alyward's testimony was corroborated by excerpts from the transcript of the recorded conversations. Agency file at Tab 4.

On May 14, 1983, appellant purchased, with his own money, a $211 postal money order, which he again made payable to the Internal Revenue Service and wrote the taxpayer's name, address, social security number, and tax period on it. He sent the money order to the agency's office in Holtsville, New York to be applied to the taxpayer's account.

Appendix A

In his testimony, appellant acknowledged that some of the remarks he made during his conversations with Mr. Alyward may involve a technical violation of the agency's HERC. However, he denied soliciting a bribe and maintains, instead, that Mr. Alyward, who still has an outstanding tax obligation, manipulated and entrapped appellant into any wrongdoing he may have committed. Further, he testified that his intent was to pay Mr. Alyward's tax deliquency as a reward for services to be performed. In that regard, he explained that the agency has been falsely accusing him of harassing Ms. Bello by sending her unsolicited gifts and cards signed "Jim." To clear his name, appellant wanted Mr. Alyward, a former law enforcement official, to help him discover "Jim's" identity. Appellant concedes that he never requested Mr. Alyward to find "Jim" or offered the taxpayer a reward for any investigative services.

At the oral reply to the notice of proposed removal, appellant was represented by a union-employed attorney,[2] who stipulated to certain specifications to the charge.[3] In specific, appellant's representative stipulated that in February, 1983, appellant told Mr. Alyward that for a sum of money and an unlisted telephone number, he could take care of the taxpayer's account. Agency file at Tab 5, p. 8. He further stipulated that on March 7, 1983, appellant told the taxpayer that for "four bills" his friend would use the computer to clear the taxpayer's account and that appellant requested Bernadette Basini's unlisted telephone number. *Id.* Moreover, he acknowledged that on March 11, 1983, appellant advised the taxpayer that it would cost the latter $500 to take

2. On appeal to the Board, appellant was represented by a private attorney.

3. A stipulation satisfies a party's burden of proving the fact alleged. 5 C.F.R. 1201.88 (1984).

care of his taxes and that the transaction should be referred to as a "loan" if the taxpayer was questioned about it. *Id.* While acknowledging appellant told the taxpayer on May 6, 1983 that he would "TC 670" the account, the representative explained that this meant that appellant would pay the taxes owed. *Id.* at 15.

At the hearing, appellant, although conceding that he was present throughout the oral reply, maintained that the union-employed attorney failed to afford him adequate representation. In specific, appellant contends that his representative prevented him from revealing all the relevant facts. It is well settled that appellant is responsible for the action or inaction of his chosen representative. *See Sofio v. Internal Revenue Service,* 7 MSPB 493, 494 (1981), *McCloskey v. Department of the Treasury,* 6 MSPB 570 (1981). Moreover, there is no indication in the transcript of the oral reply that appellant attempted to advise the agency of the "true facts" or the representative's alleged dereliction. Therefore, his allegation is without merit.

Evaluating the evidence presented, I note that Mr. Alyward's testimony was corroborated to a large extent by appellant's stipulations at the oral reply and excerpts from the transcript of the recorded conversations. Appellant's subsequent denials are entitled to reduced weight. *Risner v. Federal Aviation Administration,* 7 MSPB 342, 343 (1981), *aff'd* 677 F. 2d 36 (8th Cir. 1982). Further, his testimony is also less persuasive when I consider that appellant appeared hesitant, evasive, and less than candid in responding to questions on cross-examination. *See Weaver v. Department of the Navy,* 2 MSPB 297 (1980). In addition, his testimony concerning material facts differed from the accounts given in his prior affidavit and the oral reply. Agency

file at Tabs 4 and 5. While Mr. Alyward's testimony was somewhat inconsistent with that of Group Manager Warren Gow of the agency's inspection service, the inconsistencies were relatively minor and do not impeach the evidence supporting the specifications to the charge. *Cf. Antonucci v. Department of Justice,* 8 MSPB 167 (1981). Based on all the above, I find that the agency has supported the specifications to the charge by preponderant evidence and, therefore, the charge is sustained.

Charge 2 — Intentionally Making False Statements In a Matter of Official Interest

The agency contends that appellant violated section 225.5 of IRM 0735.1 which states, *inter alia,* that an employee may face severe disciplinary action for intentionally making false or misleading verbal or written statements in a matter of official interest. In support of the charge, Group Manager Gow testified that an agency inspector and he interviewed appellant on July 13, 1983 regarding the taped conversations between Mr. Alyward and appellant. During the interview, appellant was shown a copy of a $500 money order payable to Mr. Alyward. According to Mr. Gow, appellant initially denied that the handwriting on the money order was his, but he later admitted it when he was told that a handwriting analysis would be made. Mr. Gow further testified that appellant initially denied requesting Ms. Basini's unlisted telephone number, but appellant later acknowledged it after listening to the tape of the March 7, 1983 telephone conversation between Mr. Alyward and him. Appellant then stated that he had requested the telephone number for a friend, but he denied calling the number which Mr. Alyward had given him. After listening to a recorded telephone message left on March 29, 1983, appellant initially said that the voice sounded like a "foreigner." Appellant

later stated, "yes, I made the call." Additionally, Mr. Gow testified that appellant conceded giving Mr. Alyward money to have flowers sent to Ms. Bello, but he denied telling Mr. Alyward to use the signature "Jim" when sending the flowers. After listening to a recording of their May 6, 1983 conversation, appellant admitted telling Mr. Alyward to have the card signed "Bon Voyage, Jim." Finally, Mr. Gow testified that appellant denied using the name "Jim" in earlier correspondence to Ms. Bello. After being shown some correspondence signed "Jim" and told the correspondence would be sent for handwriting analysis, appellant acknowledged signing "Jim" on four pieces of correspondence.

At both the oral reply and the hearing, appellant denied making false or misleading statements during the interview. *See, e.g.*, Agency File at Tab 5. Alternatively, he maintains that the agency should not hold him accountable for his statements because before the interview, he took percodan, a prescribed medication which tends to cause disorientation. *Id.*[4] He does not, however, deny that he agreed to being interviewed after receiving his "constitutional rights." He is not sure whether the medication influenced his responses during the interview. In an affidavit given at the interview, appellant stated that he felt he was "being railroaded and answering all questions under duress." *Id.* at Tab 4 and 5. At the hearing, appellant testified that he was "flying high," *i.e.*, he had a feeling of well being during the interview.

In reviewing the evidence, I note that appellant offered no explanation for this apparently contradictory testimony, which

4. Appellant has taken percodan to alleviate pain caused by injuries he sustained in an automobile accident. *Id.*

tends to diminish his credibility. Moreover, he has not shown that the medication, in fact, caused the contradictions. Additionally, Mr. Gow appeared more forthright and had a more detailed and clearer recollection of the interview than appellant. His testimony is therefore entitled to more credit than that of appellant. Accordingly, I find that the charge and specifications, having been proven by preponderant evidence, are sustained.

Charge 3 — Conduct Which Needlessly Caused Dissention Among Employees

Concerning this charge, Ms. Bello testified that beginning in 1977, appellant began harassing her by continuing to send unsolicited gifts, *e.g.*, flowers and cards to her home and office, after she told him to desist. Because of appellant's continuing harassment, she filed a formal discrimination complaint against appellant in 1980 which resulted in his receipt of a reprimand the following year. Thereafter, she continued to receive unsolicited gifts including flowers and female underwear with cards signed "Jim." She recalled that one of the cards was signed "Bon Voyage, Jim." Suspecting that appellant had sent the gifts and cards and believing that he was obsessed with her, she reported the matter to the agency's inspection service.

In his testimony, appellant denied harassing Ms. Bello and maintained, instead, that she flirted with him and encouraged his display of appreciation. At the oral reply, appellant did not deny the charge or attendant specifications. Thus, his subsequent denial is entitled to less weight. *Risner, supra.* Moreover, appellant concedes that he had Mr. Alyward sent flowers and a card signer "Bon Voyage, Jim" to Ms. Bello after appellant had been

reprimanded. As noted earlier, Mr. Alyward testified that appellant said, "that will give me a chuckle; that will really tickle me." Consequently, I find the charge and specifications are supported by the requisite degree of proof and are sustained.

Affirmative Defense

At the hearing, appellant maintained that the agency improperly denied him access to the tapes of the conversations in question. The agency denies and appellant proffered no evidence to show that the proposing official relied on the tapes initiating the action. The statutory procedures set forth in 5 U.S.C. 7513(b) (1982) for effecting an employee's removal require only that the agency maintain, and the employee be provide with, upon request, copies of materials relied upon by the agency to propose the action. 5 U.S.C. 7513(a) (1982); 5 C.F.R. 752.404(f) (1984); *Martel v. Department of Transportation*, MSPB Docket No. BN075281F0558 (April 25, 1983), *aff'd* Appeal No. 83-1154 (Fed. Cir. May 18, 1984). While appellant speculates that the tapes may contain exculpatory statements, he presented no evidence in that regard. It is also significant to note that he did not avail himself of the Board's discovery procedures to obtain the tapes. *See* 5 C.F.R. 1201.71-75 (1984). I therefore find that appellant has not shown that the agency committed harmful error. *See Parker v. Defense Logistics Agency*, 1 MSPB 489, 490 (1980); *see also Shaw v. U.S. Postal Service*, 697 F.2d 1978 (Fed. Cir. 1983).

Appellant also suggested in his testimony that the action may have been influenced by animus. In that regard, he testified that a certain agency official visited his home while he was convalescing from injuries sustained in an automobile accident. He conceded, however, that he had been out of work well over a year when

this occurred. Appellant further testified that he visited his home on occasion investigating alleged wrong doing. I find that appellant's testimony is insufficient to show animus. In any event, for reasons to be discussed later, the agency would have taken the same action absent any animus. *See Gerlach v. Federal Trade Commission,* 8 MSPB 599 (1981).

Efficiency of the Service

To sustain a removal, the agency must also show that appellant's removal was taken "for such cause as will promote the efficiency of the service," 5 U.S.C. 7513(a) (1982), *i.e.*, there is a "nexus" between the sustained grounds for the agency action and the agency's ability to carry out its mission or the employee's ability to accomplish his or her job duties. *Merritt v. Department of Justice,* 6 MSPB 493 (1981); *Doe v. Hampton,* 566 F.2d 265, 272 (D.C. Cir. 1977). Here, appellant, as a Tax Examining Assistant, occupied a position involving public contact regarding tax matters. The deciding official testified that he had lost confidence in appellant's ability to function effectively in light of appellant's remarks to a taxpayer which appeared to involve solicitation of a bribe. While the agency has not shown that appellant intended to obtain a bribe, appellant involved himself in a case to which he was not assigned and gave the appearance of professional impropriety. This clearly undermines the agency's ability to maintain a favorable public image. *Cf. Johnson v. United States,* 628 F.2d 187, 193 (D.C. Cir. 1980). As to the second charge, the agency has an unchallenged right to expect its employees to provide truthful and candid responses during an investigation. *Rhoads v. Department of the Treasury,* 10 MSPB 662 (1982). Appellant's less than candid responses throughout the interview are indicative of a lack of trustworthiness. Regarding the third

charge, the agency has an interest in the morale of its employees and discouraging harassment of its employees. *See Deatrick v. Department of the Treasury*, 9 MSPB 507 (1982). In view of the foregoing, the agency has established the requisite nexus.

Another distinct determination must now be made as to whether the particular punishment imposed in this case is appropriate to the offense proven. In *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), the Board held that it would apply a "reasonableness" test in determining whether an agency-imposed penalty was appropriate. The Board further stated that only if it finds that the agency failed to weigh the relevant factors,[6] or that the agency's judgment clearly exceeded the limits of reasonableness is it appropriate to mitigate the penalty to the maximum reasonable penalty warranted under the circumstances. *Davis v. Department of the Treasury*, 8 MSPB 17 (1981).

In the instant case, appellant's offenses were serious because they patently affected the efficiency of the service. Appellant continued to harass a supervisory employee despite receiving counseling and being reprimanded. Further, appellant has not demonstrated remorse for his offenses, nor does he feel that he requires any

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6. Factors relevant for consideration in assessing the appropriateness of the penalty include: (1) the nature and seriousness of the offenses; (2) its relation to the employee's duties and responsibilities; (3) the employee's prior disciplinary record; (4) the employee's past work record, including length of service, job performance, and ability to get along with fellow workers; (5) the employee's potential for rehabilitation; and (6) other mitigating factors. *Douglas, supra*, at 332; *cf. Nagel v. Department of Health and Human Services*, 707 F.2d 1384 (Fed. Cir. 1983).

counselling. Thus, the prospect for his rehabilitation is dubious at best.

Balanced against the above, appellant has about 14 years of Government service, the last 12 of which were with the agency. His use of percodan may have caused him to be less than candid when the agency inspectors interviewed him on July 13, 1983. He has had difficulty coping with family pressures and injuries he sustained in an automobile accident. These mitigating factors, however, are insufficient to overcome the seriousness of the offenses when coupled with his prior disciplinary record and dubious potential for rehabilitation. Consequently, the penalty of removal is within the range of reasonableness and, therefore, the agency decision is AFFIRMED.

APPEAL RIGHTS

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing an original and one copy of a petition for review with:

The Secretary
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. sub section 1201.114-.115 (1984). The petition for review must be filed on or before August 29, 1984 and must set forth objections to the initial decision, supported by references to applicable laws, regulations and the record.

Appendix A

This initial decision will become a final decision of the Board on August 29, 1984 unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. sub section 1201.113 and .117 (1984).

Any appellant adversely affected or aggrieved by a final decision of the Board may obtain *judicial* review of that decision by filing a petition with the:

U.S. Court of Appeals for
the Federal Circuit
717 Madison Place
Washington, D.C. 20439

Such a petition may not be filed as long as the case is pending before the Board. To be timely, the petition must be *received* by the Court within 30 days of the final Board decision. 5 U.S.C. section 7703(b)(1).

ENFORCEMENT

Any party seeking enforcement of a final decision must file a petition for enforcement with this office in accordance with 5 C.F.R. section 1201.181 (1984).

ATTORNEY FEES

When the appellant has prevailed, (s)he may request payment of attorney fees. Any such request must be filed with this office within

Appendix A

10 days of the date this decision becomes final. 5 C.F.R. section 1201.37 (1984).

FOR THE BOARD

Dated: July 25, 1984

s/Arthur Joseph
Arthur Joseph
Presiding Official

APPENDIX B — JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-686
NY07528410320

BERNARD DUTKA,

Petitioner,

vs.

DEPARTMENT OF THE TREASURY, etc.,

Respondent

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: DISMISSED FOR FAILURE TO PROSECUTE IN ACCORDANCE WITH THE RULES.

DATED May 6, 1985

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk

s/ George E. Hutchinson
Clerk

ISSUED AS A MANDATE: June 4, 1985

APPENDIX C — NOTICE OF MOTION FOR AN ORDER VACATING DISMISSAL AND RESTORE THE CASE TO THE ACTIVE TRIAL LIST

JEFFREY S. FELDMAN
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW
Jeffrey S. Feldman*
Jay D. Greengarten
*Member N.Y. & N.J. Bar

P.O. Box 68
133 South Livingston Avenue
Livingston, New Jersey 07039
201-994-4004

May 17, 1985

United States Court of Appeals For
The Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Attention: Mrs. Carroll

Re: Bernard Dutka v. Dept. of Treasury, etc.
Appeal Number: 85-686

Dear Madam:

Enclosed herewith please find original and two copies of Motion For An Order Vacating Dismissal and to Restore Case To The

Appendix C

Active Trial List, with reference to the above matter.

Very truly yours,

s/Jeffrey S. Feldman
JEFFREY S. FELDMAN

JSF:pd
Enc.
cc: Hilery Stern, Esq.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NUMBER: 85-686

NOTICE OF MOTION FOR AN ORDER VACATING DISMISSAL AND TO RESTORE CASE TO THE ACTIVE TRIAL LIST.

BERNARD DUTKA

Petitioner/Appellant

vs.

DEPARTMENT OF TREASURY

Respondent(s)/Appellee(s)

TO: United States Court of Appeals
For The Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Hilery Stern, Esq.
Department of Justice
Commercial Litigation
550 11th Street, N.W.
Room 716
Washington, D.C. 20530

Appendix C

SIRS:

Please take notice that the undersigned attorney for Bernard Dutka, Petitioner/Appellant hereby moves for an Order vacating dismissal and to restore this case to the active trial list.

In support of this application is the attached Affidavit of Jeffrey S. Feldman, Esq. and a proposed form of Order is submitted herewith.

s/ Jeffrey S. Feldman
JEFFREY S. FELDMAN, ESQ.

STATE OF NEW JERSEY:
SS:
COUNTY OF ESSEX :

Jeffrey S. Feldman, Esq. of full age being duly sworn according to law upon his oath deposes and says:

1. I am the attorney for Petitioner/Appellant, Bernard Dutka.

2. This office has telephoned the Court on several occasions for instructions and filing content of the Brief and Appendix.

3. I tried to do my best with the limited knowledge that I had, as I was just admitted to the bar for the United States Court of Appeals For The Federal Circuit.

4. Both the Brief and Appendix were returned to me due to the fact that they were improperly printed.

Appendix C

5. I was in touch with Richard Zincowitz who advised me to contact a printer in Washington, D.C.

6. I contacted Byron S. Adams who advised me that he would forward the Brief and Appendix in its correct format to the Court.

7. I am prepared to send a messenger to Byron S. Adams, if the Court will vacate dismissal and restore this case to the active trial list.

s/ Jeffrey S. Feldman
JEFFREY S. FELDMAN

SWORN TO AND SUBSCRIBED
before me this 17th day
of May, 1985.
s/ Patricia Deck
PATRICIA DECK
A Notary Public of New Jersey
My Commission Expires Aug. 20, 1989
Registered in Union County

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NUMBER: 85-686

ORDER

BERNARD DUTKA

Petitioner/Appellant

vs.

DEPARTMENT OF TREASURY

Respondent(s)/Appellee(s)

This application being open before the Court by Jeffrey S. Feldman, Esq., Attorney for Bernard Dutka, Petitioner/Appellant and Respondent/Appellee consenting thereto and for good cause shown;

It is on this day of , 1985 hereby ORDERED that the Petitioner/Appellant hereby moves for an Order vacating dismissal and to restore this case to the active trial list.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NUMBER: 85-686

PROOF OF MAILING

BERNARD DUTKA

Petitioner/Appellant

vs.

DEPARTMENT OF TREASURY

Respondent(s)/Appellee(s)

1. I, the undersigned, am Jeffrey S. Feldman, Esq., attorney for Bernard Dotka in the above matter.

2. On May 17, 1985 I mailed in the U.S. Post Office in Livingston, New Jersey, a sealed envelope with postage prepaid thereon by certified and regular mail addressed to United States Court of Appeals For The Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439 containing Notice of Motion, with supporting Affidavit, Order and Proof of Mailing.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: May 17, 1985

s/ Jeffrey S. Feldman
JEFFREY S. FELDMAN, ESQ.

APPENDIX D — LETTER FROM THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED JULY 3, 1985

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

July 3, 1985

Mr. Jeffrey S. Feldman
133 South Livingston Avenue
Livingston, New Jersey 07039

Re: Bernard Dutka v. Department of the Treasury, Etc.
Appeal No. 85-686

Dear Mr. Feldman:

After consideration of the motion of the petitioner for an order to vacate the dismissal of this appeal and restore the case to the calendar, and respondent's opposition thereto, the motion has been denied by the Court this date.

Very truly yours,

s/ George E. Hutchinson

cc: Ralph A. Mittelberger, Esq.

GEH:bam

APPENDIX E — LETTER FROM THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED JULY 25, 1985

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

July 25, 1985

Jeffrey S. Feldman, Esq.
133 South Livingston Avenue
Livingston, NJ 07039

Re: Dutka v. Department of the Treasury
No. 85-686

Dear Mr. Feldman:

I am returning without action the motion filed in this Court on July 24, 1985. The mandate of this Court issued on June 4, 1985, thus terminating the jurisdiction of the court over this case. Moreover, the motion is a second and repetitive request for reconsideration of the dismissal of the case for failure to prosecute, and, as such, it is not authorized by any Federal or local rule of procedure.

Very truly yours,

s/ George E. Hutchinson

cc: Ralph A. Mittelberger, Esq.

Appendix E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
APPEAL NUMBER: 85-686

NOTICE OF MOTION FOR AN ORDER DENYING THE MOTION TO VACATE THE DISMISSAL AND TO RESTORE CASE TO THE ACTIVE TRIAL LIST

BERNARD DUTKA

Petitioner/Appellant

vs.

DEPARTMENT OF TREASURY

Respondent(s)/Appellee(s)

TO: United States Court of Appeals
For The Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Richard A. Mittelberger, Esq.
Department of Justice
Commercial Litigation
550 11th Street, N.W.
Room 716
Washington, D.C. 20530

Appendix E

SIRS:

Please take notice that the undersigned attorney for Bernard Dutka, Petitioner/Appellant hereby moves for an Order denying the motion to vacate the dismissal and to restore this case to the active trial list.

In support of this application is that attached Affidavit of Jeffrey S. Feldman, Esq. and a proposed form of Order is submitted herewith.

s/Jeffrey S. Feldman
JEFFREY S. FELDMAN, ESQ.

Appendix E

FILED
U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
JUL 24 1985
GEORGE E. HUTCHINSON
CLERK

STATE OF NEW JERSEY :
SS:
COUNTY OF ESSEX :

Jeffrey S. Feldman, Esq. of full age being duly sworn according to law upon his oath deposes and says:

1. I am an attorney at law in the State of New Jersey and am entrusted with the handling of the within matter on behalf of Petitioner/Appellant, Bernard Dutka.

2. This writer filed a Notice of Motion on January 22, 1985 to enlarge the time for filing a brief which was due on February 28, 1985.

3. This writer was advised that he had to be a member of the United States Court of Appeals for the Federal Circuit.

4. This writer's office telephoned the Court on numerous occasions for instructions as to how to be admitted and further as to exactly how to file the brief and appendix as well as instruction as to the content thereof.

5. This writer completed an application for admission to the Court twice and was advised that Joseph Friedman, Esq. and Harvey Poe, Esq. were not members of the bar.

Appendix E

6. This writer then contacted every attorney known to him and not one of them were members of the United States Court of Appeals for the Federal Circuit.

7. This writer was then advised by the Clerk's office that a letter of Good Standing would be sufficient.

8. This writer was further advised that Petitioner/Appellant, Bernard Dutka might have to get another attorney if this writer was not admitted to the bar.

[9. sic]

10. The motion dated January 2, 1985 was not heard until February 26, 1985.

11. Further, this office received the transcript for the hearing of June 28, 1984 during the third week of February 1985. This hearing was the basis for the appeal and therefore the transcript was needed to perfect the appeal and file the appropriate brief.

12. It was physically impossible, at the time, to write a brief in one day to comply with the Court's deadlines.

13. Subsequently, this writer telephoned the court on several occasions for further instructions as to the filing and content of the brief and appendix.

14. Every effort was made with limited knowledge available as this writer was just admitted to the bar for the United States Court of Appeals For The Federal Circuit to prepare a proper and insufficient brief and appendix.

Appendix E

15. Subsequent to the filing of the brief and appendix, they were returned as they were improperly printed. This office then contacted Richard Zincowitz who advised that this office contact a printer in Washington, D.C.

16. This office contacted Byron S. Adams who advised that he would forward the brief and appendix in its correct format to the court.

17. At the present time, this office is prepared to send a messenger to Byron S. Adams, if the court will vacate dismissal previously entered and restore this case to the active trial list.

18. The Respondents/Appellee's, Department of Treasury, Attorney, Ralph Mittelberger who originally handled this matter have requested, and in fact, made a motion which was consented to by this writer for an englargment of time within which to file a responding brief. The court granted the motion and extended the time within which the Respondent/Appellee could file the brief to May 22, 1985. On this basis, counsel has extended every courtesy to respondent and requests that the Court take this into consideration in their review of this motion.

19. On the basis of the foregoing and in reiteration, counsel had a very difficult time just being admitted for practice in counsels home forum. Every good faith effort was made to comply with the rules in a timely fashion and in fact, Bryon S. Adams has delivered to the Court, on behalf of counsel, the Brief and Appendix in the proper and acceptable form.

20. To date, counsel has incurred the cost of $2255.76 for the printing of the Brief and Appendix as well as approximately $800.00 for messenger services between this writer's office and the Court.

Appendix E

21. Petitioner/Appellant, Bernard Dutka is the sole source of income for his elderly father and mother as well as a handicapped brother.

22. This affidavit is made in support of the within Notice of Motion to vacate the dismissal previously entered herein and restore this case to the active trial list. Counsel cannot state emphatically enough that every good faith effort has been made to comply with the Court rules and to file the appropriate papers in proper form and within the time limits imposed. This office has finally prepared the papers in accordance with the guidelines and is ready, willing and able to submit same for the Courts review. Bernard Dutka should not be penalized due to the lack of experience or inadvertent mistakes of counsel in the preparation and submission of this appeal.

23. Counsel hereby certifies that every good faith effort was made to comply with the rules of court. Further, no brief is necessary as this motion contains no novel issues of law or fact.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

s/Jeffrey S. Feldman
JEFFREY S. FELDMAN, ESQ.

SWORN TO and SUBSCRIBED
before me this 15 day of July, 1985
s/Patricia Deck
PATRICIA DECK
A NOTARY PUBLIC IN NEW JERSEY
My Commission Expires Aug. 20. 1989
Registered in Union County

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NUMBER: 85-686

ORDER

- - - - - - - - - - -x

BERNARD DUTKA

Petitioner/Appellant

vs.

DEPARTMENT OF TREASURY

Respondent(s)/Appellee(s)

- - - - - - - - - - -x

This application being open before the Court by Jeffrey S. Feldman, Esq., Attorney for Bernard Dutka, Petitioner/Appellant and Respondent/Appellee consenting thereto and for good cause shown:

It is on this day of , 1985 hereby ORDERED that the dismissal of the infant appeal previously entered herein is vacated and the matter is hereby restored to the active case list.

_____

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NUMBER: 85-686

PROOF OF MAILING

- - - - - - - - - - -x

BERNARD DUTKA

Petitioner/Appellant

vs.

DEPARTMENT OF TREASURY

Respondent(s)/Appellee(s)

- - - - - - - - - - -x

1. I, the undersigned, am Jeffrey S. Feldman, Esq., attorney for Bernard Dutka in the above matter.

2. On July 15, 1985 I mailed in the U.S. Post Office in Livingston, New Jersey, a sealed envelope with postage prepaid thereon by certified and regular mail addressed to United States Court of Appeals For The Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439 containing Notice of Motion with supporting Affidavit, Order and Proof of Mailing.

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: July 15, 1985

s/Jeffrey S. Feldman, Esq.
JEFFREY S. FELDMAN, ESQ.

Appendix E

JEFFREY S. FELDMAN
A PROFESSIONAL CORPORATION
Attorney at Law
Jeffrey S. Feldman*
Jay D. Greengarten
*Member N.Y. & N.J. Bar

P.O. BOX 68
133 South Livingston Avenue
Livingston, New Jersey 07039
201-994-4004

July 15, 1985

United States Court of Appeals
For The Federal Circuit
717 Madison Place N.W.
Washington, D.C. 20439

Attention: Mrs. Carrol

Re: Bernard Dutka v. Dept. of Treasury, etc.
Appeal Number: 85-686

Dear Madam:

Enclosed herewith please find original and two copies of Motion For an Order denying the motion to vacate the dismissal and to restore case to the active trial list, with reference to the above matter.

Very truly yours,

s/Jeffrey S. Feldman
JEFFREY S. FELDMAN

JSF:pd
Enc.
Cert Mail/Reg. Mail
cc: Richard A. Mittelberger, Esq.

APPENDIX F—FEDERAL RULES OF APPELLATE PROCEDURE AND UNITED STATES CONSTITUTIONAL AMENDMENTS

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Appendix F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PROCEDURAL HANDBOOK

1. FOREWORD

This handbook contains basic information for the practitioner in processing appeals efficiently and with careful discharge of appellate responsibilities under the court's Rules. It does not amend, modify, or substitute for any of the court's Rules. Appeals are governed by the Federal Rules of Appellate Procedure (FRAP), with modifications and additions by Local Rules (CAFC) dictated by the nature of the court's jurisdiction. See Introduction to the court's Rules.

2. CONTACTS WITH THE CLERK'S OFFICE

The Clerk's Office is in Room 401 of the National Courts Building 717 Madison Place, N.W., Washington, D.C. 20439, and is open from 8:30 a.m. to 4:30 p.m. Telephone (202) 633-6550. Telephone inquiries from counsel concerning rules and procedures are welcomed. Most inquiries can be handled by any member of the clerk's staff. When calling about a case, please be prepared to give its docket number.

3. PROCEDURAL STEPS AND TIME LIMITS ON APPEALS

After an appealable judgment or order has been entered in the lower tribunal, the following steps are necessary to insure that the appeal will be considered on its merits.

Appendix F

(a) Perfection of Appeal.

(1) *Courts:* The notice of appeal is filed with the clerk of the trial court (District Court, the Court of International Trade, or the Claims Court) along with the fee for filing the notice and the $65 appellate docket fee. CAFC 10(a). The fees must be paid on filing the notice of appeal unless the appellant is granted leave to appeal *in forma pauperis* under FRAP 3. Failure to pay the docket fee may result in dismissal of the appeal. CAFC 17(c). An extension of up to 30 days for payment of fees may be granted by the trial court on a showing of excusable neglect. FRAP 4(a)(5).

(2) *Administrative Agencies:* A petition for review or notice of appeal is filed with the clerk of this court with the required fee. In appeals from the Patent and Trademark Office, appellant files the notice with the Commissioner of Patents and Trademarks and simultaneously transmits a copy to the clerk with the required fee. CAFC 10(c).

3. *Interlocutory Appeal:* A petition for leave to appeal an interlocutory order must be filed with the clerk of this court within 10 days after entry of the order. 28 USC 1292(d). No docketing fee is required until the appeal is allowed.

(b) *Time Limits.*

Appeals must be perfected within the following time limits:

(1) *Decision of a United States District Court:* 30 days from the date of judgment or order; where the United States is a party, the time as to all parties is 60 days from such entry. 28 USC 2107.

Appendix F

(2) *Final decision of the United States Court of International Trade:* 60 days after entry of judgment or order. 28 USC 2601(a).

(3) *Final decision of the United States Claims Court:* Same as for U.S. District Court. 28 USC 2521 (ref. to Section 2107).

(4) *Decision of the Patent and Trademark Office:* Not less than 60 days (or as Commissioner appoints). 35 USC 142, 15 USC 1071.

(5) *Final determinations of the International Trade Commission under 19 USC 1337:* Legislation pending to fix time at 60 days after determination becomes final.

(6) *Findings of the Secretary of Commerce under Headnote 6, Schedule 8, Part 4 TSUS:* 20 days after publication in the Federal Register of findings of Secretary. 19 USC 1202.

(7) *Decision of the Secretary of Agriculture under 7 USC 2461:* 60 days from date of decision or a further time as the Secretary may allow.

(8) *Final order or final decision of the Merit Systems Protection Board:* 30 days after the date the petitioner receives notice of the final order or decision of the Board. 5 USC 7703.

(9) *Final decision of an agency board of contract appeals under 41 USC 607(g):* The contractor, or agency head with approval of the Attorney General, may appeal, within 120 days after date of receipt of a copy of the decision.

(10) *Final decision from an agency board of contract appeals where the head of department or agency concludes the decision is not entitled to finality under 41 USC 609(b):* May be referred by such head, with approval of the Attorney General, within 120 days after receipt of a copy of the decision. 28 USC 1295(b).

4. APPEARANCE

Except for an individual appearing *pro se*, each party in an appeal, each *amicus curiae,* and each intervenor must appear through an attorney who is a member of the bar of this court. One attorney must be designated as attorney of record, others assisting in the appeal being designated as "of counsel". Each attorney of record or individual appearing *pro se* must file a written appearance with the clerk within 10 days after the appeal is docketed or after being retained or appointed. An attorney may not withdraw from representation without notice to the party represented and consent of this court. CAFC 7. For information on admission to the bar, see FRAP 46(a) and CAFC 6.

5. DOCKETING

(a) *Courts.*

Appeals will be docketed upon receipt from the clerk of the trial court of (1) a copy of the notice of appeal, (2) a certified copy of the docket entries, and (3) a copy of the appeal information sheet. Appeals under 28 USC 1292(d) will be docketed on grant of the appeal by the court and receipt of a certified copy of the docket entries and a copy of the appeal information sheet.

Appendix F

(b) *Administrative Agencies.*

Appeals are docketed upon receipt of the certified list described in FRAP 17(b) which is transmitted by the agency within 40 days after service of the petition for review.

(c) *Notification.*

The clerk of this court will notify all parties, through counsel of record, of the date on which the appeal is docketed.

6. AGREED STATEMENT — DISPOSITION ON RECORD OR BRIEFS

Counsel are urged to consider submission of an agreed statement of the case in lieu of the record. The court, on motion or *sua sponte,* may determine a case on the record alone or on the briefs.

7. RECORD

(a) *General.*

The record on appeal shall consist of all papers named in FRAP 10(a) and 16. All papers are normally retained by the tribunal from which the appeal is taken. When deemed necessary, the court, on motion or *sua sponte,* may order filing of the original or certified copies of the trial or administrative record or any portions thereof at any time during pendency of the appeal.

(b) *Transcript of Proceedings in Lower Tribunal.*

When a transcript is required, the appellant has the duty to order it from the reporter and to give notice to appellee if a partial

transcript is ordered as required by FRAP 10(b). Where no report of the proceedings was made or the transcript is unavailable, the provisions of FRAP 10(c) shall govern.

(c) *Access of Counsel to Original Record.*

The clerk of the trial court or administrative agency shall permit counsel to inspect papers in the original record and make copies thereof for use in preparing an appendix. Material subject to a protective order shall be available to counsel only if permitted by that order. CAFC 11(c).

(d) *Preservation of Protective Order on Appeal.*

Material contained in the record subject to a protective order remains subject to that order unless modified or amended by an order of this court. In a proper case the court may sit *in camera* or may seal the record, or both. CAFC 11(d).

8. CROSS APPEALS

If a timely notice of appeal (or petition for review) is filed by a party, any other party may file a notice of cross-appeal within 14 days after the date on which the first notice of appeal was filed. FRAP 4(a)(3).

9. INTERVENTION

(a) *Courts.*

A party who appears as an intervenor in a lower court proceeding shall be considered a party to the appeal upon the filing of a notice of appearance. (See No. 4 above)

(b) *Administrative Agencies.*

The provisions of FRAP 15(d) shall govern intervention in appeals from Administrative Agencies.

10. CERTIFICATE OF INTEREST

The attorney of record must file a Certificate of Interest with the filing of the notice of appearance or with a motion or petition, whichever occurs first. The text of the certificate must be included in front of the table of contents in a main or *amicus* brief. CAFC 8.

11. APPENDICES

(a) *General.*

Contents of appendices are governed by FRAP 30(a), except that those papers named in CAFC 12(a) are not to be included unless ordered by the court. The parties are encouraged to agree on the contents. Absent agreement on contents, the appellant has 10 days from date of docketing to serve on appellee a designation of the parts of the record intended to be included and a statement of issues he intends to present for review. If appellee deems further parts essential, he must designate them within 10 days after receipt of appellant's designation. Assessment of costs of production is governed by FRAP 30(b). Reproduction of exhibits is governed by FRAP 30(e).

(b) *Format.*

The appendix may be part of appellant's main brief or, if voluminous, may be produced as a separate document. In either event, it must be separately paginated. The size shall be 8 ½ x 11 inches with type matter 6 ½ x 9 ½ inches. The appendix shall

be easily readable, arranged as provided in FRAP 30(d), and, if printed spearately [sic], the cover shall conform to CAFC 13(f).

(c) *Number of Copies.*

Twelve copies shall be filed with the court with two copies served on each party to the appeal. If material subject to a protective order is included, the appendix must be filed in two segments as provided in CAFC 12(i).

(d) *Dispensing with Appendix.*

The court may dispense with the requirement of an appendix and permit appeals to be heard on the original record.

(e) *Filing.*

The appendix is due 60 days from the date of docketing.

12. BRIEFS

(a) *General.*

The provisions of FRAP 28(a)-(i) on contents of briefs, FRAP 29 on briefs *amicus curiae,* FRAP 31 on filing and service of briefs, and FRAP 32 on form, shall govern except as otherwise provided here or in CAFC.

(b) *Length.*

Principal briefs shall not exceed 50 pages and reply briefs 25 pages, exclusive of tables and pages limited only to quotations of statutes, rules, and the like. If a cross-appeal is filed, appellant's

reply brief shall not exceed 35 pages. Motions to file extended briefs will be granted only in extraordinary circumstances.

(c) *Format.*

Every brief must be easily readable. Pages must be 8 ½ x 11 inches with type matter 4 1/6 x 7 1/6 inches if standard typographic process is used or 6 ½ x 9 ½ inches if produced by another process. Typewritten briefs must have double spacing between each line of text. Covers must be of durable quality and be securely bound along left margin. Ring bindings, either metal or plastic, are not acceptable.

(d) *Number of Copies.*

Twelve copies must be filed with the court and two copies served on each party separately represented. If briefs contain material subject to a protective order the provision of CAFC 13(g) shall apply.

(e) *Content of Brief.*

The provisions of FRAP 28 on the order of content of briefs apply, except that a summary of the argument shall precede the argument, and an appellee's statement of the issues and the case must be limited to statements specifying disagreement with appellant's statement.

(f) *Content of Cover.*

The cover of each brief shall display the information contained in CAFC 13(f).

Appendix F

(g) *Filing and Service.*

Appellant's brief is due within 60 days from date the appeal is docketed. Appellee's brief is due within 40 days after service of appellant's brief. Any reply brief is due within 14 days after service of appellee's brief but at least 3 days before argument; provided that if filed less than four business days prior to argument it shall be served upon the other parties in a manner sufficient to insure receipt before the argument.

(h) *Amicus.*

Briefs of *amici curiae* are governed by FRAP 29 but shall not exceed 20 pages. No reply brief may be filed except in extraordinary circumstances.

(i) *Citations.*

Opinions of the court and its predecessors shall be cited as found in the *Federal Reporter* and, if reasonably available, the *U.S. Patents Quarterly.* CAFC 13(j).

13. TIMELY FILING

As provided in FRAP 25, papers, except briefs and appendices, are not timely filed unless actually received by the clerk within the time fixed for filing. Where the time is set by statute, including FRAP, no exceptions are permissible.

14. SERVICE

Service on a party represented by counsel must be on the counsel of record and may be personal or by mail. Service by

mail is complete on mailing. Papers presented for filing shall contain proof of service. FRAP 25(d). The three-day mailing period permitted by FRAP 26(c) does not apply to the filing of the appellant's brief or appendix.

15. COMPUTATION AND EXTENSION OF TIME

Computation of the period for filing papers is governed by FRAP 26(a). The court will not grant extensions of time except under unusual circumstances creative of hardship.

16. MOTIONS

The filing of motions is governed by FRAP 27. Each motion shall be 8 ½ x 11 inches, without backing, shall be accompanied by a proposed order, and shall meet the service requirements of No. 13 above.

The clerk may grant, for the court, certain motions that are unopposed. CAFC 9. All other motions will be decided by a panel of judges, or by a judge. When deemed advisable, motions may be submitted to the full court for decision.

17. SCREENING

Cases are evaluated ("screened") before placement on a calendar for hearing. The papers are reviewed by an evaluation committee, which reports the nature of the case, the apparent issues, a recommended time for oral argument, if any, a recommended panel size, and a recommendation respecting the likelihood of need for publication of an opinion. The panel assigned the case determines whether there shall be oral argument and, if so, the time allotted for oral argument. It advises the clerk

who will in turn advise counsel of record well in advance of the hearing date. The panel determines the panel size, notifying the Chief Judge if in disagreement with the recommendation. Determination of the need for publication of an opinion is made after the hearing.

18. "NO HEARING" CALENDAR

A decision against oral argument must be unanimous. If a case is placed on a "no hearing" calendar, the clerk advises counsel and all parties are afforded an opportunity to respond. The response may present reasons why oral argument would assist the court, or it may present answers to points raised in an opposing brief not already replied to, which answers might otherwise have been presented at oral argument. The panel will consider any such response. If at least one member of the panel then determines that oral argument would be of assistance, the panel notifies the clerk who will notify counsel as set forth in No. 17 above.

19. HEARING CALENDAR

Sessions of the court will be held as announced by the court. Although sessions will be held on a regular basis in Washington, D.C., the court may sit in any city named in 28 USC 48(a) or 48(b) to secure a reasonable opportunity for the parties to conveniently appear before the court. Counsel are advised of the hearing calendar approximately 30 days in advance thereof. Once placed on a calendar, a case will not be postponed except upon motion and a showing of compelling reasons therefor. To avoid delay in disposition or for any other reason, counsel may elect to submit on brief.

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20. PANELS

Cases will be heard by a panel of three judges, unless circumstances warrant a larger panel. Panels bear letter designations. Membership on panels is varied among the judges. Assignment of cases to panels is by letter designations and in such manner as to provide each panel with a representative cross section of the types of cases within the court's jurisdiction. The varied assignment of judges to panels and the independent assignment of varied cases to lettered panels is designed to assure opportunities for each judge to sit with all other judges, that each judge sits in all types of cases, and that both the appearance and the fact of presentation of particular cases to particular judges is avoided.

21. ORAL ARGUMENT

The members of the court will have read the briefs before oral argument, and therefore will be familiar with the case. In oral argument, counsel should emphasize the dispositive issues. The provisions of FRAP 34 apply to oral argument. Time allotted for oral argument is ordinarily 15 minutes, though more or less time will be allotted when warranted by the nature of the case. The court may extend the allotted time during the argument, or it may terminate the argument whenever in its judgment further argument is unnecessary. A motion of an *amicus curiae* to participate in oral argument, except as provided in CAFC 9(i), will be granted only in extraordinary circumstances. The provisions of FRAP 34(g) apply to use of visual aids at oral argument. If a visual aid was not used below, CAFC 14(c) governs its use.

22. CITATION OF ADDITIONAL AUTHORITIES

After a brief has been filed or after oral argument but before decision, as provided in CAFC 16, if a pertinent and significant

authority comes to the attention of a party, the party may, without special leave to the court, file an original and five copies of a letter citing the authority and stating in a single sentence the proposition it supports.

23. PUBLICATION OF OPINIONS

(a) *Published Opinions.*

The court limits publication to opinions which have precedential value or add usefully to the body of law. An election to employ an unpublished opinion must be unanimous among the panel judges. Counsel may move for publication of an unpublished opinion, citing reasons. CAFC 18(a). If such motion be granted, the unpublished opinion will be revised and published without change in result. Nothing impedes the right of any judge to require publication of his or her opinion in any case.

(b) *Unpublished Opinions.*

Unpublished opinions give counsel and the parties a statement of the reasons for the decision. They do not recite all of the facts or background of the case. They are not employed as precedent by the court and are not citable as precedent by counsel, except in support of a claim of *res judicata*, collateral estoppel or law of the case. The Bureau of National Affairs and the West Publishing Company carry a quarterly listing of the result in all cases involving unpublished opinions.

24. CIRCULATION OF OPINIONS

The authoring judge circulates a proposed opinion to the other panel members, with a vote sheet on which the other panel

members indicate their views (join, concur in result, or dissent) and any suggested modifications. Voting on a colleague's opinion is given priority in each chambers. Concurring and dissenting opinions are circulated and voted on in the same manner.

25. ISSUANCE OF OPINIONS

(a) *General.*

Opinions will be handed down or issued when ready. There is no particular day of the week to be considered a "down day." Opinions will not be issued on a holiday as defined in FRAP 26(a). The entry of judgment date, for purposes of filing a petition for rehearing or for writ of certiorari, is the day on which the opinion is dated and issued. For purposes of the first sentence of FRAP 40(a), the date on which the court enters an order that an agency order or portion thereof be enforced shall be the entry of judgment date.

(b) *Published Opinions.*

When an opinion intended for publication has been agreed upon by a majority of the panel, the authoring judge circulates one copy of the opinion, with any concurring or dissenting opinion, to each active judge not on the panel. Judges not on the panel have no participation in the panel's decision, but may, during a limited period, comment on the opinion. After the period for comment and making of changes deemed desirable, the authoring judge sends the original opinion(s) to the administrative services officer, who dates the opinion(s), prepares camera-ready copies and delivers them to the printer, who returns final copies to the clerk for distribution to the parties. Subscribers will receive published opinions from the printer.

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(c) *Unpublished Opinons.*

When an opinion not intended for publication has been agreed upon by a majority of the panel, the authoring judge sends the original opinion, and any concurring or dissenting opinion, to the administrative services officer for dating, copying and delivery to the clerk for issuance.

26. PETITIONS FOR REHEARING

(a) *General.*

A petition for rehearing may be filed within 14 days after entry of judgment. No answer shall be filed unless requested by the court, but a petition will ordinarily not be granted absent such request. Twelve copies of the petition, conforming with FRAP 32, CAFC 13(c) and 19(d) in format and pages shall be filed.

(b) *Panel Rehearing.*

When a petition for rehearing is filed, a copy is transmitted by the clerk to the members of the panel which decided the case. The panel members vote on the petition. On receipt of the votes, the judge who authored the opinon sends an order in accord with the majority vote to the clerk for dissemination to the parties.

27. HEARING OR REHEARING IN BANC

(a) *Hearing In Banc.*

A suggestion that an appeal be heard initially in banc is intended to bring to the attention of the entire court a precedent-setting question of exceptional importance and therefore must

contain the statement outlined in CAFC 19(b). Three copies in a size 8 ½ x 11 inches, with type matter 6 ½ x 9 ½ inches, shall be filed with the court, and one copy shall be served on each party on or before the date on which appellee's brief is due. No response shall be filed unless ordered by the court. Suggestions for hearing in banc are considered and decided upon by the full court, of which a majority is required to adopt the suggestion. The court may *sua sponte* order that an appeal be initially heard in banc.

(b) *Rehearing In Banc.*

A suggestion that an appeal be reheard in banc is intended to bring to the entire court either a precedent-setting question of exceptional importance or a panel opinion allegedly in conflict with precedent of the United States Supreme Court or of this circuit. The suggestion must contain one or both statements outlined in CAFC 19(b). Fifteen copies of a petition suggesting rehearing in banc are required. A majority vote of all active judges is required to grant an in banc rehearing. If a senior judge participated in the original hearing and disposition of the case, that judge may participate in consideration and decision on the petition and in any rehearing of the appeal in banc.

(c) *Combined Petition for Rehearing and Suggestion for Rehearing In Banc.*

Petitions for Rehearing (see No. 26 above) may be combined with a suggestion for rehearing in banc. In that event, the petition is decided by majority vote of the panel that rendered the decision in the case, and the suggestion is decided by majority vote of the judges as in (b) above.

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28. MANDATES

Mandates are issued 21 days after entry of judgment unless a timely petition for rehearing is pending or a motion for stay has been granted. FRAP 41. That a mandate has issued does not affect the right to apply for writ of certiorari.

29. RECUSAL OF A JUDGE

A judge recuses himself under 28 USC 455, as amended December 5, 1974:

(a) In a proceeding in which his impartiality might reasonably be questioned;

(b) When he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) When in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(d) When he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(e) When he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a

financial interest* in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) When he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

1. Is a party to the proceeding, or an officer, director, or trustee of a party;

2. Is acting as a lawyer in the proceeding;

3. Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

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* "Financial interest" means ownership of legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

"i. Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

"ii. An office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in such securities held by the organization;

"iii. The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

"iv. Ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities."

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4. Is to the judge's knowledge likely to be a material witness to the proceeding.

When a judge recuses himself, another judge is assigned to sit in his place.

30. ATTORNEY FEES AND EXPENSES

(a) *In this Court.*

The court may award attorney fees and expenses where authorized by law. An application is due within 30 days after date of decision. The content of each application must comply with CAFC 20(a)(2).

(b) *Appeals and Petition for Leave to Appeal.*

An appeal of a grant or denial of attorney fees by a lower tribunal not subject to the Equal Access to Justice Act (EAJA) is an appeal subject to all rules governing appeals. A petition for leave to appeal a denial of attorney fees by an agency under the EAJA is subject to CAFC 10(b).

31. MISCELLANEOUS

(a) *Title of Petition for Mandamus or Prohibition.*

A petition for writ of mandamus or prohibition shall not bear the name of the respondent but shall be titled in the form and in the number of copies set forth in CAFC 21.

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(b) *Complaints of Judicial Conduct.*

Copies of the procedures for processing complaints of judicial conduct pursuant to 28 USC 372(c) are available from the clerk on request.

(c) *Judicial Conference.*

An annual Judicial Conference shall be held at a time and place designated by the Chief Judge. All members of the bar of the court are eligible to participate at the Conference. CAFC 22.

(d) *Failure to Prosecute.*

The clerk may dismiss an appeal for failure to prosecute in accordance with the Rules. Reconsideration of such dismissal may be sought from the court by motion within 10 days after receipt of notice of dismissal. CAFC 23.

Appendix F

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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INTRODUCTION

Appeals shall be governed by the Federal Rules of Appellate Procedure (FRAP), with such modifications and additions as are dictated by the nature of the court's jurisdiction. Provisions of FRAP applicable to a "District Court" shall apply to the United States Court of International Trade and the United States Claims Court. Masculine terms include the feminine equivalent.

This table reflects the relationship of the Federal Rules of Appellate Procedure to Rules of this court adopted pursuant to FRAP 1, 2, and 47:

FRAP	LOCAL RULE
3(d)	10
4(a)	10
5	10
7	10
10(a)(b)(c)(e)	9, 10, 11
11(a)(e)	11
12	11
15(a)(c)	10, 11
16(b)	9, 11
17(b)	10, 11
21	21
27	9, 11
28(a)-(i)	9, 13
28(j)	16
29	9, 13
30	12
31	13
32	12, 13, 19
34	3, 14, 15
35	19
40	19
46(a)	6

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RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Effective: February 1, 1984

I. THE COURT

Rule 1

SEAL

The seal of the court shall contain on its outer edge the legend "Seal of the United States Court of Appeals for the Federal Circuit" with a ring of 50 stars therein. In the center of the seal are the Scales of Justice resting on a book and superimposed over an outline of the United States of America. The clerk shall be the keeper of the seal which shall be the means of authentication of all records and certificates issued from this court.

Rule 2

SESSIONS — PLACES OF HOLDING COURT

(a) *Sessions.* Sessions of the court will be held as announced by the court.

(b) *Places of Holding Court.* The court may hold sessions in any place named in 28 U.S.C. § 48 and permitted under 28 U.S.C. § 48(b).

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Rule 3

PANELS

(a) *Panels.* Cases and controversies will be heard and determined by a panel consisting of an odd number of judges not less than three. A panel of more than three judges may be provided when warranted.

(b) *Assignment of Cases.* Assignment of cases to panels will be made so as to provide each judge with a representative cross-section of the cases heard by the court.

Rule 4

EMPLOYEES AND FORMER EMPLOYEES

No employee of the court shall engage in the practice of law. No former employee of the court shall participate or assist, by way of represenation, consultation or otherwise, in any case pending in the court during the period of employment.

Rule 5

COMPLAINTS OF JUDICIAL CONDUCT

The procedures for processing complaints of judicial conduct pursuant to 28 U.S.C. § 372(c), as added by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), are incorporated into these rules. Copies of these procedures are available from the clerk on request.

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II. ATTORNEYS

Rule 6

ADMISSIONS TO THE BAR

(a) *Qualifications for Admission.* Admissions to the bar of this court are subject to the provision of FRAP 46(a). In addition, an attorney who is admitted to practice before the United States district courts for Puerto Rico and the Northern Mariana islands, the United States Court of International Trade, the United States Claims Court, or the District of Columbia Court of Appeals, who is in good standing therein, and who is of good moral and professional charactaer, is eligible for admission to the bar of this court.

(b) *Procedure for Admission.* Attorneys may be admitted to the bar in open court by appearing personally with a sponsor, who is a member of the bar of this court, who states the applicant's qualifications and moves his admission. Motions for admission to the bar will be entertained at the opening of each session of court. An attorney may also be admitted upon written motion of a member of the bar of the court. This motion shall be submitted on a form approved by the court and furnished by the clerk. The oath in either instance shall be that prescribed by the court.

(c) *Admission Fee.* The prescribed fee for admission is $25.00, payable to the clerk, for which the applicant shall receive a certificate of admission. For a duplicate certificate of admission the fee is $10.00. The clerk as trustee shall deposit the fee in a special account in a bank designated by the court.

(d) *Government Attorneys.* Attorneys for any federal, state or local government office or agency may appear before this court in connection with their official duties without being formally admitted to practice before the court.

Rule 7

APPEARANCE

(a) *Parties and Amicus Curiae Represented.* Except for an individual appearing *pro se*, each party and *amicus curiae* must appear through an attorney who is authorized to practice before this court and shall designate one attorney as the attorney of record. Other attorneys assisting the attorney of record shall be designated as "of counsel."

(b) *Appearance.* Each attorney of record or individual appearing *pro se* must file a written appearance with the clerk within ten days after the appeal has been docketed. Attorneys retained or appointed thereafter shall file an appearance within 10 days after being retained or appointed. The appearance shall include the name of the party or parties represented and the name, address, and telephone number of the attorney or the individual appearing *pro se*. Attorneys' appearances shall show the name of the law firms or public or quasi-public legal offices with which they are associated. Until such time as an attorney of record has filed a written appearance for a party or a party has appeared *pro se*, service of all papers shall be made upon that party's attorney of record in the proceeding below or upon the party if *pro se*. An attorney of record may not withdraw as such from the representation of a party without serving notice on the party and without the consent of the court.

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Rule 8

CERTIFICATE OF INTEREST

Certificate of Interest. To enable determination of whether recusal is necessary or appropriate, an attorney for a party or *amicus curiae* other than the United States must furnish a certificate of interest stating:

(a) The full name of every party or *amicus* represented by the attorney in the case;

(b) The name of the real party in interest, if the party named in the caption is not the real party in interest;

(c) Any publicly held affiliates, if a party or *amicus* is a corporation;

(d) The names of all law firms whose partners or associates have appeared for the party in the lower tribunal or are expected to appear for the party in this court.

Twelve copies of the certificate shall be filed with the notice of appearance or with a motion or petition in this court, whichever occurs first. The text of the certificate (i.e., caption omitted) shall also be included in front of the table of contents of the main brief of a party and the brief of an *amicus*. The certificate shall be in the form set forth in the Appendix to these rules.

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III. PRACTICE

Rule 9

UNOPPOSED PROCEDURAL MOTIONS

Procedural Motions. Pursuant to FRAP 27(b), the clerk may dispose of any procedural motion timely filed and served, when the motion is consented to or unopposed and seeks to:

(a) Dismiss an appeal;

(b) Remand a case;

(c) Enlarge time for filing a brief, appendix, or petition, et cetera, or for designating the contents of an appendix;

(d) Stay issuance of a mandate pending application to the Supreme Court of the United States for a writ of certiorari for a period not to exceed 30 days;

(e) Consolidate appeals;

(f) Correct a brief or other paper;

(g) Correct or modify record in accordance with FRAP 10(e) or FRAP 16(b);

(h) File brief *amicus curiae* pursuant to FRAP 29;

(i) Grant an *amicus curiae* leave to participate in oral argument by sharing time with other counsel;

(j) Stay further proceedings;

(k) Withdraw or substitute an appearance or a party;

(l) Permit an excess of not more than ten pages beyond limitations contained in FRAP.

(m) Advance or continue a case.

Rule 10

NOTICE OF APPEAL, TRANSMITTAL OF CERTIFIED COPY OF DOCKET ENTRIES OR CERTIFIED LIST

(a) *Courts — Appeals as of Right*

(1) *Manner of Filing; Time for Filing.* A notice of appeal shall be filed in the manner and within the time prescribed by FRAP 4(a). If, pursuant to statute, the trial court has adopted a rule which deems a document filed on the date it is transmitted by a specified type of mail, a notice of appeal shall be deemed filed in accordance with that rule.

(2) *Service of the Notice of Appeal; Appeal Information Sheet; Certified Copy of Docket Entries.* Upon the filing of a notice of appeal, the clerk of the trial court shall serve copies of the notice of appeal as provided by FRAP 3(d). In addition, the clerk of the trial court shall promptly transmit to the clerk of this court: (a) a copy of the notice of appeal; (b) a certified copy of the docket entries (up to and including the notice of appeal); and, (c) the Appeal Information Sheet prescribed by this court.

(3) *Payment of Fees.* Upon the filing of any notice of appeal, the appellant shall pay to the clerk of the trial court such fees as are established by statute and also the docket fee prescribed by Rule 17 of these rules, the latter to be received by the clerk of the trial court on behalf of this court.

(b) *Courts — Appeals by Permission*

(1) *General.* Appeals by permission pursuant to 28 U.S.C. 1292(d) shall be governed by FRAP 5(a), (b), and (c).

(2) *Grant of Permission; Payment of Fees; Cost Bond; Notice of Appeal Unnecessary.* Within 10 days after the entry of an order granting permission to appeal, the appellant shall (a) pay to the clerk of the trial court such fees as are established by statute and the docket fee prescribed by Rule 17 of these rules, the latter to be received by the clerk of the trial court on behalf of this court; and, (b) file a bond for costs is required pursuant to FRAP 7. A notice of appeal need not be filed.

(3) *Notice to be Provided by Clerk of the Trial* Court; *Certified Copy of Docket Entries.* The clerk of the trial court shall notify the clerk of this court of the payment of the fees specified in paragraph (b)(2) of this Rule and shall simultaneously transmit a certified copy of the docket entries and the Appeal Information Sheet to the clerk of this court.

(c) *Administrative Agencies*

(1) *Petitions for Review; Payment of Fees (Except Patent and Trademark Office).* FRAP 15(a) shall govern appeals from administrative agencies. Upon filing of a petition for review, the petitioner shall pay to the clerk of this court such fees as are

prescribed by statute and the fee prescribed by Rule 17 of these rules.

(2) *Service of the Petition for Review; Certified List (Except Patent and Trademark Office).* FRAP 15(c) shall govern service of the petition for review. Upon service of the petition upon the agency, the agency shall promptly, but no later than 40 days following service, transmit the certified list described in FRAP 17(b) to the clerk of this court.

(3) *Appeals From Decisions of the Patent and Trademark Office; Payment of Fee; Notice to Commissioner; Certified List.* A notice of appeal from a decision of the Patent and Trademark Office, and reasons of appeal if required, shall be filed with the Commissioner of Patents and Trademarks within the time prescribed by law. The appellant shall simultaneously transmit a copy of the notice and any reasons of appeal, together with the fee prescribed by Rule 17 of these Rules, to the clerk of this court. Upon receipt of the notice and any reasons of appeal, the Commissioner shall promptly, but not later than 40 days following receipt of the notice, transmit to the clerk of this court a certified list as described in FRAP 17(b), which shall constitute compliance with the requirement of 35 U.S.C. 143 and 15 U.S.C. 1071(a)(3) for the transmission of a certified record to the court.

Rule 11

RECORD ON APPEAL: TRANSMISSION OF DOCKET ENTRIES OR CERTIFIED LIST: DOCKETING

(a) *General*

(1) Composition of Record. The record on appeal shall consist of those papers named in FRAP 10(a) and 16.

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(2) *Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered; Duty of Reporter to Prepare and File Transcript; Notice to Court.* FRAP 10(b) and 10(c) and the first paragraph of FRAP 11(b) shall govern the preparation and filing of the transcript of proceedings in the tribunal from which appeal is taken.

(3) *Correction or Modification of Record.* FRAP 10(e) and 16(b) shall govern correction or modification of the record except that no supplemental record need be transmitted to this court.

(4) *Retention of Record.* All papers shall be retained by the tribunal from which appeal is taken, as provided in FRAP 11(e) and 17(b). When deemed necessary, the original or certified copies of the trial or administrative record, or portions thereof, may be ordered by this court, on motion or *sua sponte,* at any time during pendency of the appeal.

Docketing of Appeals.

(1) *From Courts.* In appeals from courts, the clerk of this court shall enter the appeal on the docket upon receipt of the documents required by Rule 10(a)(2) and Rule 10(b)(3) of these Rules.

(2) *From Administrative Agencies.* In appeals from administrative agencies, the clerk of this court shall enter the appeal on the docket upon receipt of the certified list required by Rule 10(c)(2) and Rule 10(c)(3) of these Rules.

(3) *Clerk to Provide Notice.* The clerk of this court shall give notice to all parties of the date on which the appeal was docketed.

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(c) *Access of Counsel to Original Record.*

(1) *Material Not Subject to a Protective Order.* When a notice of appeal or petition for review is filed, the clerk of the trial court or the administrative agency shall permit counsel to inspect the non-confidential original papers, transcript, and exhibits, for purposes of the preparation of the appendix. The clerk of the trial court or the administrative agency shall permit counsel to make copies of these materials upon payment of the customary fee.

(2) *Material Subject to a Protective Order.* Counsel shall be permitted access to and to make copies of material contained in the record governed by a protective order issued by the trial court or administrative agency in accordance with the protective order. If the protective order is amended, modified, or annulled by this court, pursuant to paragraph (d) of this rule, the access of counsel shall be governed by the order of this court.

(3) *Patent and Trademark Office Proceedings.* Upon the filing of a notice of appeal from a decision of the Patent and Trademark Office, the Commissioner shall permit counsel of record in the Office to inspect the original papers and exhibits for purposes of the preparation of the appendix. The Office shall permit counsel to make copies of these materials upon payment of the customary fee.

(d) *Preservation of Protective Order on Appeal.* Material contained in the record on appeal which is subject to a protective order issued by the trial court, or an administrative agency, shall remain subject to that order, unless this court, on motion, amends, modifies, or annuls the order.

(e) *In Camera Proceeding.* In a proper case, where the interests of justice require, and upon a convincing showing thereof by motion properly made, the court will sit *in camera* or may seal its record, or both.

Rule 12

APPENDICES

(a) *Contents.* FRAP 30(a) shall govern the contents of the appendix, except that the following will not be included in appendices other than by leave or order of this court:

(1) briefs and memoranda
(2) notices
(3) subpoenas
(4) summonses in appeals other than those from the Court of International Trade
(5) motions to extend time
(6) admissions and affidavits of service and mailing
(7) jury lists.

(b) *Determination of Contents of Appendix; Cost of Production.* The determination of the contents of the appendix and the assessment of costs of production shall be governed by FRAP 30(b), except that the 10-day period specified in the second sentence of that rule shall commence upon the docketing of the appeal in this court. If a transcript of the proceedings is required before the contents of the appendix can be designated and if the transcript has been ordered but not completed within the time periods prescribed by this rule and FRAP 30(b), a party may request an extension of time within which to designate the contents of the appendix.

(c) *Format.* Appendices shall be easily readable and substantially conform to FRAP 32, except that papers shall be 8½ x 11 inches. If printed separately, the cover shall conform to Rule 13(f).

(d) *Arrangement.* FRAP 30(d) shall govern the arrangement of the appendix.

(e) *Pagination; Optional Separate Document.* The appendix and the brief should normally be incorporated within one cover. If voluminous, the appendix may be filed as a separate document. In either event, the appendix and the brief shall be separately paginated.

(f) *Number of Copies.* Except for appendices containing material subject to a protective order (see paragraph (i) of this Rule), twelve copies of the appendix must be filed with the court.

(g) *Service.* Two copies of a separate appendix shall be served on counsel for each party represented.

(h) *Reproduction of Exhibits.* FRAP 30(e) shall govern the reproduction of exhibits.

(i) *Materials Subject to a Protective Order.*

1. *Two Segments Of Appendices; Number of Copies.* If a party deems it necessary to include material subject to a protective order in an appendix, the appendix shall be filed in two segments.

a. *Confidential Segment; Labelling; Number of Copies.* One appendix segment shall be labelled "confidential" on the

cover and five copies shall be filed with the court. In addition, each page of a "confidential" segment containing confidential material shall bear a legend to the effect that the page contains material subject to a protective order.

b. *Non-Confidential Segment; Labelling; Number of Copies.* The second appendix segment shall be labelled "non-confidential" on the cover and twelve copies shall be filed with the court. In addition, each page of the "non-confidential" segment from which material subject to a protective order has been deleted shall bear a legend so stating.

(2) *Service; Number of Copies.* Each party to the appeal shall be served with two copies of the non-confidential segment of the appendix and, when permitted by the applicable protective order, with two copies of the confidential segment.

(3) *Non-Availability to the Public.* Confidential segments of appendices filed with the court shall be available only to authorized court personnel and shall not be made available to the public.

(4) *Costs.* The costs of preparing separate segments of appendices may be assessed as provided in FRAP 30(b).

(j) *Hearing of Appeals on the Original Record Without the Necessity of an Appendix.* Pursuant to FRAP 30(f), the court, upon motion or *sua sponte*, may dispense with the requirements of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

Appendix F

Rule 13

BRIEFS

(a) *General.* Except as otherwise provided in these rules, FRAP 28(a)(i), 29, 31 and 32 shall govern briefs filed in this court.

(b) *Length.* Except by leave of court, principal briefs shall not exceed 50 pages and reply briefs shall not exceed 25 pages, exclusive of the certificate of interest, the table of contents, tables of citations, and pages devoted only to quotations of statutes, rules, and the like. If a cross-appeal is filed, the appellant's reply brief shall not exceed 35 pages. The court looks with disfavor upon motions to file extended briefs and will grant them only for extraordinary reasons.

(c) *Format.* Every brief shall be easily readable and shall comply with FRAP 32, except that pages shall be 8 1/2 x 11 inches. If produced by standard typographic process, type matter shall not exceed 4 1/6 by 7 1/6 inches. If produced by any other process, type matter shall not exceed 6 1/2 by 9 1/2 inches. Briefs shall have a cover of durable quality on both front and back sides and be securely bound along the left hand margin to insure that the bound copy will not loosen or fall apart. Ring type bindings, plastic or metal, are not acceptable. Externally positioned staple ends must be covered with tape.

A brief produced by typewriter and photocopied shall contain a clear black image on white paper to permit easy reading, with double spacing between each line of text. Elite, or type similar thereto, shall not be considered 11 point type. The clerk may refuse to file any brief which has not been printed or bound in conformity with FRAP 32 and this rule.

(d) *Number of Copies.* Except for briefs containing material subject to a protective order (see paragraph (h) of this Rule), twelve copies of each brief shall be filed with the court and two copies shall be served on counsel for each party separately represented.

(e) *Content of Brief.* The order of content of briefs shall be in conformity with FRAP 28, except that a summary of the argument shall precede the argument, and an appellee's statement of the issues and the case shall be limited to statements of disagreement, if any, with the statements of appellants.

(f) *Content of Cover.* The cover of each brief shall, from top to bottom, display this informtion in this order:

1. The title of the document and the designation of the party for whom it is filed (e.g., Brief for Appellant):
2. The name of this court.
3. The docket number of the case in this court.
4. The title of the case, appellants, appellees, petitioners, respondents, etc., being so designated.
5. The nature of the proceedings in this court and the name of the agency, board, or court from which the appeal is taken (e.g., appeal from the Claims Court) including, where applicable, the name of the judge for whose judgment appeal is taken.
6. The names, addresses, and telephone numbers of all counsel representing or servicing as counsel for the party on whose behalf the document is filed.
7. A black line shall appear under each of entries 1 through 5.

(g) *Time for Service and Filing; Service of Certain Reply Briefs.* The appellant shall serve and file its brief within 60 days after the date upon which the appeal is docketed in this court in accordance with Rule 11(b)(1)(2) of these rules. The appellee

shall serve and file its brief within 40 days after service of the brief of the appellant. The appellant may serve and file a reply brief as provided in FRAP 31. A reply brief filed four business days or less prior to oral argument shall be served in such manner as to reach the addressee before the argument.

(h) *Briefs Containing Material Subject to a Protective Order.*

1. *Two Sets of Briefs.* If a party deems it necessary to refer in a brief to material covered by a protective order, two sets of briefs shall be filed.

a. *Confidential Set; Labelling; Number of Copies.* One set of briefs, consisting of five copies, shall be labelled "confidential" on the cover and be filed with the court. In addition, each page containing confidential material shall bear a legend so indicating.

b. *Non-Confidential Set; Labelling; Number of Copies.* The second set of briefs, consisting of twelve copies, shall be labelled "non-confidential" on the cover and be filed with the court. In addition, each page of the "non-confidential" set from which material subject to a protective order has been deleted shall bear a legend so stating.

(2) *Service.* Each party to the appeal shall be served two copies of the "non-confidential" brief, and, when permitted by the applicable protective order, two copies of the "confidential" brief.

(3) *Non-Availability to the Public.* The confidential set of briefs filed with the court shall be available only to authorized court personnel and shall not be made available to the public.

Appendix F

(i) *Amicus Curiae.* Briefs of *amici curiae* shall be governed by FRAP 29, but shall not exceed 20 pages except by leave of court. An *amicus* may not file a reply brief except by leave of court granted only in extraordinary circumstances.

(j) *Citations.* It is preferred that opinions of this court and its predecessors be cited as found in the Federal Reporter and, if reasonably available, the United States Patents Quarterly. Parallel citations to other reports are discouraged.

> *Guotos, v. United States,* 552 F.2d 992 (Ct. Cl. 1976)
> *In re Sponnable,* 405 F.2d 578, USPQ 237 (CCPA 1969)
> *South Corporation v. United States,* 690 F.2d 1368, 215 USPQ 657 (Fed. Cir. 1982)
> *Doe v. Roe,* 12-345, slip op. (Fed. Cir. October 1, 1982)

Rule 14

VISUAL AIDS

(a) *General.* FRAP 34(g), as supplemented by the additional provisions of this Rule, shall apply to the use of visual aids at oral argument.

(b) *Used Below.* Use at oral argument of illustrative models, specimens, samples, charts, diagrams, and other visual aids used below, is encouraged.

(c) *Not Used Below.* When a visual aid was not part of the presentation below, its proposed use shall be brought to the attention of opposing counsel not less than 15 days before the date of hearing. Objections, if any, shall be in writing, served on all adverse parties and filed not less than 5 days prior to the

hearing date. This rule shall neither preclude agreement of counsel on the use of visual aids nor preclude use of a chalkboard or equivalent during oral argument.

(d) *Disposition.* The clerk may dispose of visual aids left in his custody more than 90 days after the appeal is decided.

Rule 15

ORAL ARGUMENT

(a) *General.* FRAP 34, as supplemented by the additional provisions of this Rule, shall apply to oral argument. The provisions of FRAP 34(a) respecting unanimity of the panel in dispensing with oral argument, opportunity to submit a statement supporting oral argument, and the criteria to be employed in determining whether oral argument is needed, are adopted and made part of this Rule.

(b) *Time Allowed.* The time allowed each side for oral argument shall be determined by the court. Counsel will be advised by the clerk of the time allotted by the court. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) *Amicus Curiae.* Except as provided in Rule 9(i) of these Rules, a motion of an *amicus curiae* to participate in oral argument will be granted only for extraordinary reasons.

(d) *In Camera Hearing.* As reflected in Rule 11(e), the court may sit *in camera.*

Appendix F

Rule 16

CITATION OF ADDITIONAL AUTHORITIES

When a pertinent and significant authority comes to the attention of a party after its brief has been filed, or after oral argument but before decision, the party may, without special leave of court, file with the clerk an original and five copies of a letter addressed to the court citing the additional authority, with service upon opposing counsel. The letter shall refer either to a page of the brief or to a point raised at oral argument and shall state in a single sentence the proposition the authority supports. It shall contain no other argument or explanation. A copy of the authority cited, if not yet published, shall accompany each copy of the letter. Any response shall be made within seven days of receipt of service by opposing counsel, shall be limited to a short statement of why the authority is considered inapplicable, and shall be served upon counsel who filed the additional authority.

Rule 17

FEES

(a) *Schedule of Fees.* Except as expressly provided in these Rules, the fees to be charged by the clerk of this court shall be the fees prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913. No fees are to be charged for services rendered on behalf of the United States. The fees are as follows:

(1) For docketing a case on appeal or petition for review, or docketing any other proceeding, ... $65.00
A separate fee shall be paid by each party filing a notice of appeal or petition for review, but parties filing a joint notice of appeal

or petition for review are required to apply only one fee. The docketing fee shall not be charged for the docketing of an application for the allowance of an interlocutory appeal under 28 U.S.C. § 1292(d) unless the appeal is allowed.

The docketing fee will be paid to the clerk of the trial court on the filing of the notice of appeal in that court. The docketing fee will be paid to the clerk of this court on the docketing of any other proceeding, including an appeal or petition for review from the Patent and Trademark Office or from an administrative agency.

(2) For every search of the records of the court and certifying the results thereof, ... $ 2.00

(3) For certifying any document or paper, other than a certificate of admission to the Bar, but including a certificate of good standing, whether the certification is made directly on the document or by separate instrument, ... $ 2.00

(4) For reproducing any record or paper (per page), ...$ .50

(5) For comparing with the original record thereof any copy of a transcript of record, entry, record or paper, submitted for certification, per page or fraction thereof, ... $ 2.00

(6) For reproduction of the record in any appeal in which the requirement of an appendix is dispensed with by the court pursuant to FRAP 30(f), a flat fee of, ... $25.00

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(7) For each copy of an opinion, including any separate and dissenting opinions, regardless of whether the copy is certified, ... $ 2.00

but no charge shall be assessed for:

(i) A copy of the opinion furnished to each party of record in the case, and

(ii) Copies of opinions furnished persons and organizations whose names are included on a public interest list established by order of the court.

(b) *Fees to be Paid in Advance.* The clerk shall not be required to docket any proceeding or perform any other service until all fees due the clerk have been paid, except at the direction of a judge of this court or where a party has been granted leave to proceed without prepayment of fees.

(c) *Dismissal of Appeal for Failure to Pay Docketing Fee.* If a proceeding is docketed without prepayment of the docketing fee, the appellant shall pay the fee within 14 days after docketing. If the appellant fails to do so, the clerk is authorized to dismiss the appeal.

Appendix F

IV. DISPOSITION OF CAUSES

Rule 18

OPINIONS AND ORDERS OF THE COURT

(a) *Opinions.*

All decisions, and opinions accompanying decisions, of this court shall be provided to the parties, shall be public records of the court, and shall be accessible to the public. Disposition of appeals shall be with a published opinion or an unpublished opinion. Opinions which do not add significantly or usefully to the body of law or would not have precedential value will not be published in commercial reports of decisions. Opinions designated as unpublished shall not be employed as precedent by this court, nor may they be cited by counsel as precedent, except in support of a claim of res judicata, collateral estoppel, or law of the case. A party may, on motion, request that an unpublished opinion be reissued as a published opinion, citing reasons therefor. Such motion will be granted or denied by the panel that rendered the decision.

(b) *Orders.*

The action of the court in granting or denying motions, petitions, and similar actions, shall be reflected in an order of the court.

Appendix F

Rule 19

PETITIONS FOR REHEARING AND SUGGESTIONS FOR FOR HEARING AND REHEARING IN BANC

(a) *General.* FRAP 35 and 40, as supplemented by the additional provisions of this rule, shall apply to petitions for rehearing and to suggestions for hearing or rehearing *in banc*. A suggestion for *in banc* consideration, whether upon initial hearing or rehearing, is an extraordinary procedure. Upon initial hearing, the suggestion is intended to bring to the attention of the entire court a precedent-setting question of exceptional importance. On rehearing, the suggestion is intended to bring to the entire court either a precedent-setting question of exceptional importance or a panel opinion that is allegedly in conflict with precedent of the Supreme Court of the United States or of this circuit. The petition for rehearing or suggestion for rehearing *in banc* shall state on the cover whether it requests rehearing by the panel or suggests rehearing *in banc* or both. Counsel are reminded that the duty of counsel is fully discharged without filing a suggestion for rehearing *in banc* if the case does not meet the rigid standards of FRAP 35(a), and that the filing of a petition for rehearing or suggestion for rehearing *in banc* is not prerequisite to filing a petition for a writ of certiorari to the Supreme Court.

(b) *Content of Suggestion of Hearing or Rehearing In Banc.* A suggestion that an appeal be initially heard *in banc* shall contain the following statement of counsel at the beginning of the suggestion:

> I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more precedent-setting questions of exceptional importance: (set forth each question in one sentence).

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A suggestion that an appeal be reheard *in banc* shall contain one or both of the following statements of counsel, as applicable, at the beginning of the suggestion:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit: (cite, specifically the case or cases).
>
> I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more precedent-setting questions of exceptional importance: (set forth each question in one sentence).
>
> /s/ _____
> ATTORNEY OR RECORD
> FOR_____

(c) *Suggestion for Hearing In Banc; Format; Number of Copies.* A suggestion for hearing *in banc* shall comply with FRAP 32(b), except that it shall be 8½ x 11 inches with type matter 6½ x 9½ inches. Three copies of a suggestion for hearing *in banc* shall be filed with the court and one copy shall be served upon each party.

(d) *Petitions for Rehearing and Suggestions for Rehearing In Banc; Format; Number of Copies.* Petitions for rehearing by the panel and suggestions for rehearing *in banc* shall be in the format for briefs set forth in FRAP 32 as supplemented by Rule 13(c) of these rules. The cover of the petition shall be yellow and the cover of the answer, if one is required by the court, shall

be brown. Twelve copies of a petition shall be filed, except that fifteen copies of a petition shall be filed if the petitioner suggests rehearing *in banc*.

Rule 20

ATTORNEY FEES AND EXPENSES

(a) *Attorney Fees and Expenses Incurred in this Court.*

(1) *Time for Filing; Responses.* The court may award attorney fees and expenses where authorized by law. Applications must be filed within 30 days after the date of the decision involved. No response shall be filed to an application unless directed by the court, but no application will be granted without an opportunity to submit a response.

(2) *Content of Application.* Each application for attorney fees and expenses as provided in (a)(1) shall contain a citation to the authority which authorizes an award, and shall indicate the manner in which the prerequisites for an award have been fulfilled. In addition, each application shall contain a statement, under oath, which specifies:

(i) the nature of each service rendered;

(ii) the amount of time expended in rendering each type of service; and

(iii) the customary charge for each type of service rendered.

Appendix F

(b) *Appeals and Petitions for Leave to Appeal.*

1. *Appeals.* An appeal of the grant or denial of attorney fees by a lower court or by an agency not subject to the Equal Access to Justice Act is an appeal subject to all of the rules governing appeals.

(2). *Petitions for Leave to Appeal.* A petition for leave to appeal a denial of attorney fees by an agency under the Equal Access to Justice Act shall be subject to Rule 10(b) of these rules.

Rule 21

TITLE OF PETITION FOR MANDAMUS OR PROHIBITION

A petition for writ of mandamus or writ of prohibition shall not bear the name of the respondent, but shall be entitled simply "In Re: [Name of Petitioner], Petitioner." Unless otherwise ordered by the Court, the respondent need not file a formal response. Five copies of the petition are required to be filed.

Appendix F

V. MISCELLANEOUS

Rule 22

JUDICIAL CONFERENCE

There shall be held annually at such time and place as shall be designated by the Chief Judge, a Conference for the purpose of considering the state of business of the court and advising ways and means of improving the administration of justice. It shall be the duty of each active judge to attend the Conference and, unless excused by the Chief Judge, to remain throughout the Conference. The Chief Judge presides at the Conference. All members of the bar of the court may be members of the Conference and participate in its discussions and deliberations. Attendees shall pay a registration fee to be applied to the payment of expenses of the Conference as approved by the Chief Judge.

Rule 23

FAILURE TO PROSECUTE

The clerk may dismiss an appeal for failure to prosecute in accordance with the rules. Reconsideration of such dismissal may be sought from the court by motion within 10 days after receipt of notice of dismissal.

Appendix F

APPENDIX

CERTIFICATE OF INTEREST

(Caption of Case)

The undersigned counsel of record for John Doe, (plaintiff-appellant), furnishes the following list in compliance with Rule 8:

(Listed by lettered category)

_____

Attorney's Signature

_____

Date

Appendix F

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UNITED STATES CONSTITUTIONAL AMENDMENT

AMENDMENT [V] [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G — ACKNOWLEDGEMENT FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT OF THE FILED PETITION FOR REVIEW

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

Sept. 6, 1984

General Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

attn: E.W. Swift

Title: Bernard Dutka vs. Dept. of Treasury, etc.

Case Number: Initial decision dated 7/25/84

Dear Sir:

This is to acknowledge receipt on August 30, 1984 of a petition for review, copy attached, of a decision of your agency.

Upon receipt of the certified record list described in FRAP 17(b), the case will be docketed as provided in CAFC Rule 11(b)(2).

Very truly yours,

s/ George E. Hutchinson

Appendix G

cc: Mr. Cohen
Mr. Feldman**

** We will accept your letter as a petition for review but we do need a filing fee check for $65.00 by 9/20/84. Also in the future we need an original and three copies of each petition for review. CAFC

APPENDIX H — NUMBER AND DOCKETING INSTRUCTIONS FROM THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-686

Date of Notice Oct 29 1984

TO COUNSEL FOR APPELLANT AND COUNSEL FOR APPELLEE

1. Calendar. This appeal is calendared for submission (after argument or on the briefs) during the first full week of Apr.-May 1985. (CAFC 15, FRAP 34)

2. Entry of Appearance. Complete and return the enclosed form within ten days after date of docketing. (CAFC 7)

3. Certificate of Interest. File twelve copies with entry of appearance, motion, or petition, whichever occurs first. See form in appendix to rules. The Certificate, without the caption, must be bound in front of the Table of Contents of each main brief. (CAFC 8)

4. Retention of Record. All papers are retained by the lower tribunal unless ordered by the court on motion. (CAFC 11(a)(4))

5. Appendix. Counsel should agree on appendix contents; otherwise, appellant must designate record portions within ten days after docketing; appellee then has ten days to cross-designate. Appendix is part of appellant's brief and is due 60 days after docketing. (CAFC 12-13, FRAP 30)

6. Size of Paper. All papers must be 8½ x 11; type matter 6½ x 9½. (CAFC 12(c), 13(c))

7. Miscellaneous.

Mandates (FRAP 41)
Computation of time for filing papers (FRAP 26(a))
Format of appendices (CAFC 12 - FRAP 30, 32); briefs (CAFC 13 - FRAP 28(a-i), 29, 31 and 32), motions (FRAP 27 (a))
Petitions for Rehearing (CAFC 19 - FRAP 35, 40)

8. Questions. Contact the Clerk's Office if you have questions on rules procedure.

George E. Hutchinson, Clerk
U.S. Court of Appeals for the
Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439
(202) 633-6550

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

October 29, 1984

Jeffrey S. Feldman, Esq.
P.O. Box 68
133 South Livingston Ave.
Livingston, NJ 07039

Title: Bernard Dutka vs. Dept. of Treasury, etc.

Appeal Number: 85-686

This is to advise that the above-entitled appeal has been docketed on the above date and given the indicated case number. (CAFC Rule 11(b)(2))

Enclosed is a copy of the Rules of the Court, the Procedural Handbook, and Entry of Appearance form and Notices to Counsel emphasizing certain rule requirements and the evaluation of appeals.

Under the provisions of FRAP (17(b) and CAFC 11(a)(4), all papers contained in the administrative record will be retained by the agency unless ordered by this on motion or *sua sponte* during the pendency of the appeal. Should it be necessary to order

the record, this office will request the agency to transmit the record promptly and so advise you.

Very truly yours,

s/ George E. Hutchinson

enclosures

cc: Hillary A. Stern, Esq.

APPENDIX I — ENTRY OF APPEARANCE AND CERTIFICATE OF INTEREST DATED NOVEMBER 8, 1984

JEFFREY S. FELDMAN
A PROFESSIONAL CORPORATION
Attorney at Law
Jeffrey S. Feldman*
Jay D. Greengarten
*Member N.Y. & N.J. Bar

P.O. Box 68
133 South Livingston Avenue
Livingston, New Jersey 07039
201-994-4004

November 8, 1984

United States Court of Appeal For The
Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Attention: Clerk

Re: Bernard Dutka v. Dept. of Treasury, etc.
Appeal Number: 85-686

Dear Sir:

Enclosed herewith please find Entry of Appearance together with twelve copies of the Certificate of Interest, with reference to the above matter.

Very truly yours,

s/ Jeffrey S. Feldman
JEFFREY S. FELDMAN

JSF:pd
Enc.

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ENTRY OF APPEARANCE
(See CAFC Rule 7)

NO. 85-686

Bernard Dutka
Petitioner(s)/Appellant(s)

v.

Department of Treasury
Respondent(s)/Appellee(s)

Please enter my appearance as counsel for Bernard Dutka who/which in this court is

__Petitioner __Respondent __Amicus Curiae

__Appellant __Appellee __Intervenor

Name Bernard Dutka

Address 30 Windsor Street

City and State Kearny, New Jersey, Zip 07032,
Phone 991-3898

Signature s/Bernard Dutka Date November 8, 1984

It shall be the obligation of counsel to inform the Clerk of any changes in the above information.

Appendix I

NOTE: When more than one attorney represents a single party or group of parties counsel shall designate one individual to receive notification from the Clerk, with the understanding that that individual shall have the obligation to inform other counsel. The person to be notified in this case is:

Name Jeffrey S. Feldman, Esq.

Address 133 South Livingston Avenue

City and State Livingston, New Jersey Zip 07039
Phone 994-4004

CERTIFICATE OF INTEREST

(a) Bernard Dutka

(b) Bernard Dutka

(c) No

(d) Jeffrey S. Feldman
Jay D. Greengarten, Associate

November 8, 1984

APPENDIX J — CORRECTED CERTIFICATE OF INTEREST IN COMPLIANCE WITH RULE 8 DATED NOVEMBER 26, 1984

JEFFREY S. FELDMAN
A PROFESSIONAL CORPORATION
Attorney at Law
Jeffrey S. Feldman*
Jay D. Greengarten
*Member N.Y. & N.J. Bar

P.O. Box 68
133 South Livingston Avenue
Livingston, New Jersey 07039
201-994-4004

November 26, 1984

United States Court of Appeals
For The Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Attention: Miss McKenna

Re: Bernard Dutka v. Dept. of Treasury, etc.
Appeal Number: 85-686

Dear Miss McKenna:

As per our telephone conversation of even date, enclosed herewith please find original and twelve copies of the corrected Certificate Of Interest, with reference to the above matter.

Sincerely,

JEFFREY S. FELDMAN

JSF:pd
Enc.

Appendix J

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NUMBER: 85-686

CERTIFICATE OF INTEREST

.. ..

BERNARD DUTKA

Petitioner/Appellant

vs.

DEPARTMENT OF TREASURY

Respondent(s)/Appellee(s)

.. ..

The undersigned counsel of record for Bernard Dutka, (plaintiff-appellant), furnishes the following list in compliance with Rule 8:

(a) Bernard Dutka

(b) Bernard Dutka

(c) No

(d) Jeffrey S. Feldman
Jay D. Greengarten, Associate

s/JSF

Dated:

APPENDIX K — APPLICATION FOR ADMISSION TO THE COURT DATED JANUARY 2, 1985

JEFFREY S. FELDMAN
A PROFESSIONAL CORPORATION
Attorney at Law
Jeffrey S. Feldman*
Jay D. Greengarten
*Member N.Y. & N.J. Bar

P.O. Box 68
133 South Livingston Avenue
Livingston, New Jersey 07039
201-994-4004

January 2, 1985

United States Court of Appeals
For The Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Attention: Clerk

Re: Bernard Dutka v. Dept. of Treasury, etc.
Appeal Number 85-686

Dear Sir:

Enclosed herewith please find Application For Admission To The Bar, with reference to the above matter.

Very truly yours,

Jeffrey S. Feldman

JSF:pd
Enc.

Appendix K

United States Court of Appeals for the Federal Circuit
APPLICATION FOR ADMISSION TO THE BAR

Application: I, Jeffrey Stuart Feldman whose mailing address is
(Please print)

133 S. Livingston Ave.,
(Street address/P.O. Box)
Livingston, New Jersey 07039 (201-994-4004) do hereby make
(City, State, Zip Code) (Phone Number)

application for admission to the bar of the United States Court of Appeals for the Federal Circuit. My personal statement showing my eligibility for membership is as follows: I am admitted to practice in the following court (or courts):

N.J. Supreme Court 1976, Federal District Court of N.J. '76
All courts in NY State 1981

s/ J S Feldman
Signature of Applicant

MOTION: I, Joseph L. Friedman, a member of the bar of this
(please print)
Court, do hereby move for admission of the above attorney.

s/ Joseph L. Friedman
Signature of Sponsor

(FOR WRITTEN MOTION ONLY)

OATH: I, Jeffrey Stuart Feldman, do solemly swear (or affirm) that I will demean myself as an attorney and counselor of this Court, uprightly and according to law, and that I will support the Constitution of the United States of America.

Appendix K

Subscribed and sworn to before me this 2nd day of January, 1985

My commission expires on July 1, 1986 s/Joseph L. Friedman
[SEAL] *(Over)* *Signature of Notary*

NAME: ~~Jeffrey~~ Feldman Jeffrey Stuart
(PLEASE PRINT) *(Last)* *(First)* *(Middle)*

ADMISSION FEE: Fee for admission to the bar of this Court is $25.00. Checks should be made payable to "U.S. Court of Appeals, Federal Circuit." Send to: Admissions Clerk, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

FOR CLERK'S USE ONLY:

FEE PAID:____Yes ____No **DATE PAID:**_____

Admitted this____day of _____, 19____

CLERK
UNITED STATES COURT OF APPEALS

BY:_____

RULE 46, FEDERAL RULES OF APPELLATE PROCEDURE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appendix K

JEFFREY S. FELDMAN
A PROFESSIONAL CORPORTION
Attorney at Law
Jeffrey S. Feldman*
Jay D. Greengarten
*Member N.Y. & N.J. Bar

P.O. Box 68
133 South Livingston Avenue
Livingston, New Jersey 07039
201-994-4004

January 30, 1985

Clerk
U.S. Court of Appeals, Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Attention: Ms. Twiford

Re: Bernard Dutka

Dear Ms. Twiford:

As per my secretary's telephone conversation with you of even date, enclosed please find my Application For Admission To The Bar, with reference to the above matter.

Very truly yours,

JEFFREY S. FELDMAN

JSF:pd
Enc.

Appendix K

United States Court of Appeals for the Federal Circuit
APPLICATION FOR ADMISSION TO THE BAR

Application: I, Jeffrey Stuart Feldman whose mailing address is
(Please print)

133 S. Livingston Ave.,
(Street address/P.O. Box)
Livingston, New Jersey 07039 (201-994-4004) do hereby make
(City, State, Zip Code) (Phone Number)

application for admission to the bar of the United States Court of Appeals for the Federal Circuit. My personal statement showing my eligibility for membership is as follows: I am admitted to practice in the following court (or courts):

N.J. Supreme Court 1976, Federal District Court of N.J. '76
All courts in NY State 1981

s/ J S Feldman
Signature of Applicant

MOTION: I, Joseph L. Friedman, a member of the bar of this
(please print)
Court, do hereby move for admission of the above attorney.

s/ Joseph L. Friedman
Signature of Sponsor

(FOR WRITTEN MOTION ONLY)

OATH: I, Jeffrey Stuart Feldman, do solemly swear (or affirm) that I will demean myself as an attorney and counselor of this Court, uprightly and according to law, and that I will support the Constitution of the United States of America.

Appendix K

Subscribed and sworn to before me this 2nd day of January, 1985

My commission expires on July 1, 1986 s/Joseph L. Friedman
[SEAL] *(Over)* *Signature of Notary*

NAME: ~~Jeffrey~~ Feldman Jeffrey Stuart
(PLEASE PRINT) *(Last)* *(First)* *(Middle)*

ADMISSION FEE: Fee for admission to the bar of this Court is $25.00. Checks should be made payable to "U.S. Court of Appeals, Federal Circuit." Send to: Admissions Clerk, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

FOR CLERK'S USE ONLY:

FEE PAID:____Yes ____No **DATE PAID:**_____

Admitted this____day of _____, 19____

CLERK
UNITED STATES COURT OF APPEALS

BY:_____

RULE 46, FEDERAL RULES OF APPELLATE PROCEDURE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX L — ADMISSION TO THE COURT EFFECTIVE FEBRUARY 12, 1985

JEFFREY S. FELDMAN
A PROFESSIONAL CORPORATION
Attorney At Law
Jeffrey S. Feldman*
Jay D. Greengarten
*Member N.Y. & N.J. Bar

P.O. Box 68
133 South Livingston Avenue
Livingston, New Jersey 07039
201-994-4004

February 5, 1985

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, DC 20439

Attention: Pam Twiford

Re: Bernard Dutka

Dear Ms. Twiford:

I hereby acknowledge receipt of your note dated February 4, 1985. Enclosed please find my Application For Admission To the Bar, which has been notarized, with reference to the above matter.

Very truly yours,

JEFFREY S. FELDMAN

JSF:pd
Enc.

Appendix L

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

FEB 12 1985

Jeffrey S. Feldman
133 S. Livingston Ave.
Livingston, NJ 07039

Dear Member:

Your application for admission to the bar of this Court is in order and I have enrolled you as an attorney entitled to practice in the Court.

Your certificate of membership will be mailed to you under separate cover in approximately 2 months.

Sincerely,

s/ George E. Hutchinson
Clerk

APPENDIX M — LETTER FROM THE COURT DATED FEBRUARY 26, 1985 GRANTING EXTENSION

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

Date February 26, 1985

Appeal No. 85-686, Dutka v. Dept. of the Treasury, Etc.

Dear Mr. Feldman:

Pursuant to motion, petitioner has been granted leave to file the following paper out of time and the same has been filed this date.

( ) Brief/Appendix for Appellant/Petitioner

( ) Brief for Appellee/Respondent

( ) Brief for Amicus Curiae

( ) Reply Brief

( ) Petition for Rehearing

Appendix M

(X) Petitioner's Motion for an Extension of Time*

FOR THE COURT

George E. Hutchinson, Clerk

s/Elizabeth J. Carroll
BY Elizabeth J. Carroll
Deputy Clerk

*Said extension has been granted. Petitioner's brief is due on or before February 28, 1985.

cc: Ms. Hillary A. Stern
Mr. David M. Cohen

APPENDIX N — LETTER DATED MARCH 4, 1985 GRANTING EXTENSION UNTIL MARCH 18, 1985

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

March 4, 1985

Mr. Jeffrey S. Feldman
133 South Livingston Avenue
Livingston, New Jersey 07039

Re: Bernard Dutka v. Department of the Treasury, Etc.
Appeal No. 85-686

Dear Mr. Feldman:

The motion of the petitioner for an extension of time to file a brief/appendix in this appeal has been granted but only to the extent that said paper will be due on or before March 18, 1985.

Very truly yours,

s/ George E. Hutchinson

cc: Hillary A. Stern, Esq.

APPENDIX O — LETTER DATED MARCH 18, 1985 TO UNITED STATES COURT OF APPEALS RE: COVER PAGE

JEFFREY S. FELDMAN
A PROFESSIONAL CORPORATION
Attorney at Law
Jeffrey S. Feldman*
Jay D. Greengarten
*Member N.Y. & N.J. Bar

P.O. Box 68
133 South Livingston Avenue
Livingston, New Jersey 07039
201-994-4004

March 18, 1985

United States Court of Appeals
For The Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Attention: Clerk

Re: Bernard Dutka v. Dept. of Treasury, etc.
Appeal Number: 85-686

Dear Sir:

Enclosed herewith please find original and twelve copies of Brief of Bernard Dutka, with reference tc the above matter. Please be advised that this letter and briefs have been served by messenger.

Very truly yours,

s/ J S Feldman
JEFFREY S. FELDMAN

JSF:pd
Enc.
cc: Hillary A. Stern, Esq.

Appendix O

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

April 23, 1985

Mr. Jeffrey S. Feldman
133 South Livingston Avenue
Livingston, NJ 07039

Re: 85-686
Bernard Dutka vs. Department of the Treasury

Dear Mr. Feldman:

As we have previously advised on March 18 and April 10, 1985, unless corrected briefs and appendices in this appeal are received by May 1, 1985 the case will be dismissed on that date.

Sincerely,

s/ George E. Hutchinson
George E. Hutchinson
Clerk, CAFC

cc: Ralph A. Mittelberger, Esq.

Appendix O

JEFFREY S. FELDMAN
A PROFESSIONAL CORPORATION
Attorney at Law
Jeffrey S. Feldman*
Jay D. Greengarten
*Member N.Y. & N.J. Bar

P.O. Box 68
133 South Livingston Avenue
Livingston, New Jersey 07039
201-994-4004

April 24, 1985

United States Court of Appeals
For The Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: Bernard Dutka v. Department of the Treasury
85-686

Dear Sir:

I have been advised by my secretary that the esthetic part of my brief and appendix is not proper in that the covers were wrong and that the papers themselves were affixed wrong. My secretary has advised me that she has offered to send covers down and that you said that this would be unacceptable. I would appreciate if you would mark this brief and appendix filed in time, then return all or some of the copies to me so that I may

put the proper covers on them and affix them properly and forward them back to you immediately.

Sincerely,

JEFFREY S. FELDMAN